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REPORTS OF CASES

DECIDED IN THE

2532

COURT OF APPEAL.

ON APPEAL FROM THE SUPERIOR AND COUNTY
COURTS—APPEALS IN INSOLVENCY—
AND ELECTION CASES.

BY

J. STEWART TUPPER

BARRISTER-AT-LAW AND REPORTER TO THE COURT.

CHRISTOPHER ROBINSON, Q.C.,

EDITOR.

VOL. VI.

CONTAINING THE CASES DETERMINED
FROM THE 20TH DECEMBER, 1880, TO THE 28TH NOVEMBER, 1881,
WITH A TABLE OF THE NAMES OF CASES ARGUED,
A TABLE OF THE NAMES OF CASES CITED,
AND A DIGEST OF THE PRINCIPAL MATTERS.

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J U D G E S
OF THE
COURT OF APPEAL,

DURING THE PERIOD OF THESE REPORTS.

THE HON. THOMAS MOSS, C. J. O. (*Ob.*)
" " JOHN GODFREY SPRAGGE, C. J. O.
" " GEORGE WILLIAM BURTON, J. A.
" " CHRISTOPHER SALMON PATTERSON, J. A.
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Attorney-General :
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MARTINDALE V. CLARKSON.

Dower—42 Vic. ch. 22, O.

Held, that the statute 42 Vic. ch. 22, O., "An Act to amend the law of Dower," does not apply to mortgages made before it was passed.

The petitioner, a married woman, filed a petition in the Court of Chancery for the purpose of obtaining a declaration that she was entitled to an inchoate right of dower in certain lands formerly belonging to her husband, but which having become vested in Mr. Clarkson, as assignee of his estate and effects under the Insolvent Act, had been sold by him, and praying that a portion of the purchase money should be set apart to answer her claim in the event of her surviving her husband.

The property was subject to two mortgages, one given on the 24th June, 1875, the other on the 11th November, 1878, each of which contained the ordinary release of dower to be found in the short form of mortgages.

The husband became insolvent on the 27th August, 1879, and on that day made an assignment to Clarkson in terms of the Act.

In January following the interest of the insolvent was sold by the assignee for a sum of \$1,870 in excess of the mortgages.

The claim was made under the provisions of an Act of the Ontario Legislature, 42nd Vic. ch. 22, entitled "An Act to

amend the law of Dower," and which received the Lieutenant-Governor's assent on the 11th March, 1879.

Proudfoot, V. C., dismissed the petition.

The case was argued on September 14, 1880 (*a*).

McClive, for the appellant. A married woman who bars her dower by joining with her husband in a mortgage comprising lands of which her husband is seized in fee simple has, except as against the mortgagee, all the rights, incidents, and estate in such lands as dowress as if she had not barred her dower, and the appellant is therefore entitled to inchoate dower in the moneys arising from the sale of the equity of redemption in question, to the same extent as if such mortgage had not been executed by her. By the Act 42 Vic. ch. 22, which was clearly intended as a remedial Act, the inchoate right to dower in the lands to which the appellant was previously entitled was made absolute, except as against the mortgages, and the subsequent assignment in insolvency by her husband, and the subsequent sale by the respondent of the equity of redemption had not the effect of depriving her of her inchoate dower in the equity of redemption in the lands or in the moneys arising from the sale thereof. The appellant is at all events entitled to have a sufficient portion of the moneys set apart and secured in the event of her surviving her husband, and so becoming entitled to dower in the purchase money of this estate as inchoate dowress of the lands. He cited *Smith v. Smith*, 3 Gr. 451; *Robertson v. Robertson*, 25 Gr. 276, 486; *Skinner v. Ainsworth*, 24 Gr. 148; *Wilson v. Williams*, 3 Jur. N. S. 810; *Campbell v. Royal Canadian Bank*, 19 Gr. 334; Insolvent Act 1875, secs. 16, 76, 77; R. S. O. ch. 126; *Maxwell on Statutes*, pp. 18, 20, 191, 195, 202.

J. H. McDonald, for the respondent. The appellant has no interest in the moneys in question which are the proceeds of the sale of the equity of the redemption in lands

(a) *Present*.—MOSS, C.J.A., BURTON, PATTERSON, and MORRISON, JJ.A.

vested in the respondent as assignee of the insolvent, and not the proceeds of the sale of any estate or interest of the appellant. If the conveyance of the equity of redemption by the insolvent to the respondent, and by the respondent to the purchaser, has had the effect of depriving the wife of any claim to dower she can have no interest in the moneys in question; while if it has not had that effect she can still look to the land for her dower. The mortgages on the lands in question were made before the passing of the Act 42 Vic. ch. 22, and that Act is not retrospective. It only applies when the mortgage is made after the passing of the Act and a sale takes place under the mortgage while the mortgagor is seized of the equity of redemption. Moreover, the Act does not entitle the wife of a mortgagor to dower in the equity of redemption unless the mortgagor dies seized. The sale here did not take place under the mortgage but was a sale of the equity of redemption subject to the mortgage, and at the time of the sale the mortgagor was not seized of the equity of redemption.

December 20, 1880. BURTON, J. A.—The first question which arises is, whether the Act 42 Vic. ch. 22, O., applies to the circumstances of this case, the mortgages having been given prior to the passing of the Act. If that question cannot be answered in the affirmative, it is unnecessary to consider the other objections which have been urged to the petitioner's claim.

It was strongly urged that the Statute is a remedial one and should be construed so as to give full effect to the intention of the Legislature, but placing a liberal construction upon it is one thing, giving it a retrospective operation is another, and we have to consider how such a construction may affect vested rights, and if it would have the effect of defeating such rights, it would be contrary to sound policy to give it a retrospective operation unless it is a necessary implication from the language used that the Legislature so intended.

That is the ordinary rule as to the interpretation of all statutes, whether remedial or otherwise. How then did the law stand and what was the position of the parties previously to the passing of the Statute. The wife having joined in the mortgage of the legal estate would have been entitled to dower out of the equitable estate only in the event of her husband dying seized. A conveyance by him of the equity of redemption would have effectually defeated her claim to dower, and that equity of redemption was available to creditors in satisfaction of her husband's debts. A creditor having obtained judgment and execution against the husband prior to the 11th March, 1879, was entitled to enforce it by sale of the husband's interest in the lands free from any claim to dower on the part of the wife. Is this right taken away by the language of this statute? Applying the rule laid down by Baron Parke in the familiar case of *Moon v. Durden*, 2 Ex. 22, is there anything on the face of this Act which puts it beyond doubt that the Legislature meant it to be retrospective, so as to deprive execution creditors of their right to realize their debts out of the husband's lands as they might have done but for its passing. I confess that to my mind the language has not only no such meaning, but leads to a directly contrary conclusion.

In *Regina v. Ipswich*, L. R. 2 Q. B. D. 269, the late Chief Justice of England, thus states the law: "It is a general rule that where a statute is passed altering the law, unless the language is expressly to the contrary, it is to be taken as intended to apply to a state of facts coming into existence after the Act."

In the earliest reported case we have on the subject, *Gilmore v. Shuter*, 2 Mod. 310, the Court held that, however general the language of the statute, it could not have been intended to affect past promises which were valid when it came into operation, and that it must therefore be construed as applying to future contracts only.

We have no copy of the judgment of the learned Vice-Chancellor, who it is said considered the Statute as merely

confirmatory of the views of the Court of Chancery in *Robertson v. Robertson*, 25 Gr. 486.

I have not considered the effect of the statute, as in my opinion it was not applicable in the present case.

I think, therefore, that the appeal should be dismissed, with costs.

PATTERSON, J.A.—I find myself compelled to agree that the Statute 42 Vic. ch. 22, secs. 1, 2, 3, can only be held to apply to mortgages made after its passing.

I adopt this conclusion with some reluctance, because the contract evidenced by the mortgage being one with the mortgagee, and not one between the husband and the wife; there being no design in what is done by the wife to benefit the husband at her expense, farther than by enabling him to deal on more advantageous terms with the mortgagee; and this being true of mortgages already made as well as those yet to be made; it would not appear to be unjust in the Legislature to declare that the effect of every such mortgage should be in law what the parties really understood when they made it. That would in substance be a declaration that whenever a husband, by mortgaging his land, had converted his legal estate into an equitable estate, his wife barring her dower in the legal estate which he conveyed to the mortgagee, the Statute R. S. O. ch. 126, sec. 1, should be extended so as to entitle her to dower out of that equitable estate, notwithstanding that the husband should not die seized of it.

It may perhaps be found, when it becomes necessary to consider the question, that that is the effect of the Statute upon mortgages made after its passing. The enactment that no bar of dower contained in any mortgage, &c., shall operate to bar such dower to any greater extent than shall be necessary to give full effect to the rights of the mortgagee or grantee under the instrument, when read by the light of the following sections which secure to the woman her dower when the husband's equity of redemption is sold under any power of sale contained in the mortgage or

under legal process, may be found capable of that interpretation; although the change in the character of her inchoate right to dower is due to the husband's conveyance, which leaves him only an equitable estate, as much as to her own bar of dower. The matter will doubtless arise for discussion in some proper case. At present it is not incumbent upon us to express any opinion respecting it. I apprehend, however, that one of two constructions of the Statute must prevail: either that it confers the right to dower out of such an equity of redemption of which the husband does not die seized, in all cases, whether he loses it by his own direct conveyance or it is sold under power of sale or legal process; or that the new right is confined to cases of the latter class, which are those for which sections two and three provide certain procedure.

In either alternative there is clearly a new right given, namely, dower out of an equitable estate of which the husband does not die seized. To such dower, the Legislature applies the rule adopted by the Court of Chancery in *Robertson v. Robertson*, 25 Grant 486, estimating it upon the whole value of the land and not on the surplus over the incumbrance; but it extends the rule to cases not reached by that decision, when it recognizes the right of the wife where the sale takes place in the lifetime of the husband.

And in either alternative an illustration is afforded of the danger of giving to the Statute what is called a retrospective construction, when we observe that it would apply as well to cases in which the husband had sold his equity of redemption as to those in which at the time of the passing of the Act he retained it, and would thus interfere with vested rights.

If considerations of this kind did not present themselves, but the statute clearly operated only as between husband and wife, not affecting others who may have acquired interests before its passing, the objections to construing it retrospectively might not be found insurmountable. As it

is, I do not see how they can be got over, and therefore I concur in dismissing the appeal.

MORRISON, J.A., concurred.

*Appeal dismissed.**

ROSS V. FITCH.

Principal and agent—Sub-agent—Privity of contract.

W. & Co., attorneys in the Province of Quebec, for B. & Co., there, requested the defendant, an attorney in the Province of Ontario, to sue a company there on a promissory note made by them, of which B. & Co. were the holders. Defendant issued the writ in the name of B. & Co., and endorsed his own name as attorney. He, however, never had any communication with them, treating only with W. & Co., who had sent him many similar claims to collect, and crediting them with the amount of the note when collected.

Held, affirming the judgment of the County Court, that the plaintiff, who was the assignee of B. & Co., was entitled to recover from defendant the amount so collected: the rule that the town agent of a country principal is not accountable to a client of the latter not being applicable, as W. & Co. were merely the agents of B. & Co. to retain the defendant to act as their attorney, between whom and W. & Co. a direct privity of contract therefore existed.

APPEAL from the County Court of the united counties of Northumberland and Durham.

The plaintiff, who was assignee in insolvency of a company called the Baylis Wilkes Manufacturing Company, which carried on business in the Province of Quebec, brought this action to recover from the defendant, who was

* Moss, C.J.A., was absent on account of illness when judgment was delivered, but the parties consented to accept the judgment of Burton, Patterson, and Morrison, JJ.A.

an attorney practising at Brantford in this Province, a sum of money collected by the defendant's firm from an Ontario company, called the Brown Paterson Manufacturing Company, being the amount of a promissory note made by the latter company and held by the other.

A legal firm in Montreal called Doutre, Doutre, Robideau, Hutchinson & Walker, did business for the plaintiff. Mr. Walker, one of that firm, wrote to the defendant's firm enclosing the promissory note. His letter was in these words :

" MONTREAL, March 22nd, 1878.

" RE BAYLIS WILKES & B. P.

" My dear Sirs.—I enclose you claim in this matter—note for \$123. Please push the same for collection with all speed possible. We have written but have received no reply whatever. I am, &c.

" W. S. WALKER."

It appeared from the evidence of Mr. Fitch, that he or his firm had received other accounts for collection from Mr. Walker in the same way as this. All communications came from Mr. Walker, although he was understood to be acting for his firm. The defendant had no communications with Mr. Walker's clients; he kept his account with Mr. Walker, charging him with costs in suits brought, and crediting him with moneys collected. That Walker assented to this, or ever paid costs so charged, did not appear. It would rather seem that he never did so. In defendant's cross-examination, it was said : " The claim was sent by Mr. Walker as all other claims ; took instructions from him, made collections and remitted, and accounted to him ; had no communication with his clients ; never had any communication with the Baylis Wilkes Manufacturing Company, or with their assignee, the plaintiff ; all the knowledge witness had about the parties he received from Mr. Walker ; received from Mr. Walker twenty or thirty claims ; always kept the account with him, and charged the costs to him ; some of the claims were not collected ; in these cases charged the costs to Walker ; sent Walker a

statement of his account about 2nd August, 1879; he was credited for the sums collected by witness; amongst sums so collected is the claim in question, which is credited; never had any communication with the Baylis Wilkes Manufacturing Company about the matter; the account shows a balance due Walker of \$4, but there are other matters not charged; the above correspondence was with Walker; the proceedings were taken in the name of the Baylis Manufacturing Company; there has been no settlement of accounts with Walker; the *fi. fa.* was endorsed by witness as attorney for the Baylis Wilkes Manufacturing Company."

The account rendered, a copy of which was in evidence, contained charges in a number of cases, only the one in question being in a matter in which the plaintiff was concerned. It contained credits of \$155.20c. for debt and costs in *Baylis Wilkes Manufacturing Co. v. Brown Paterson Manufacturing Co.*, and charges amounting to \$26.63 for costs in the same suit. There was no other money credited in the account, except an item of \$11.48c. received by cheque to pay costs of that amount charged in another suit.

The learned Judge of the County Court, before whom the case was tried without a jury, rendered a verdict for the plaintiff.

The defendant appealed.

The appeal was argued on the 10th November, 1880 (a).

Robinson, Q.C., for the appellant. The appellant's contention is, that the respondent cannot maintain this action against him inasmuch as no privity exists between them, and that he is accountable to no one except W. S. Walker, the attorney in Montreal, who employed him. The appellant and respondent stand in the same relation to each other that a client of a country attorney does to the town agent of the latter; and the law is well settled both here

(a) *Present.*—BURTON, PATTERSON, and MORRISON, JJ.A.

and in England that the client cannot bring an action against the town agent to recover moneys received by the latter in that capacity: *Cobb v. Becke*, 6 Q. B. 930; *Chitty's Archibold*, 13th ed., 158, 162; *Pulling on Attorneys*, p. 446; *Collins v. Brook*, 5 H. & N. 700; *Stephens v. Badcock*, 3 B. & Ad. 354; *Scrace v. Whittington*, 2 B. & C. 13; *Story*, on Agency, sec. 231. *Robbins v. Fennell*, 11 Q. B. 248, shews that *Moody v. Spencer*, 2 D. & R. 6, on which the learned Judge relied, has not been followed. In the case of *Taylor v. A. & B.*, 1 U. C. L. J. 300, the claim was in the Division Courts, and therefore the attorneys were not acting in their capacity as such. The rule on which a sub-agent is held to be liable to the principal is, that the principal must have known that the business could not be done without the employment of a sub-agent, and has no application in this case. The general law relating to the liability of a sub-agent to account to his principal is clearly stated in *DeBussche v. Alt*, L. R. 8 Ch. D. 286.

J. B. Clark, for the respondent. The evidence shews that the appellant acted, not as agent for Walker, but as attorney for the respondent. Walker was merely the respondent's agent in Montreal for the purpose of retaining an attorney in Ontario, and the attorney when so retained became the respondent's attorney. The writ was endorsed in his name as attorney for the respondent, and it was only in that capacity that he could act in the matter at all: R. S. O. ch. 140 sec. 25. The cases of *Robbins v. Fennell*, and *Cobb v. Becke*, do not apply. In these cases the town agent was held to be merely the hand by which the attorney in the cause saw fit, for his own convenience, to do the work. A town agent is never treated as attorney in the cause. Process issued by him is required to be endorsed in the name of the attorney as well as that of the agent issuing it. In *Taylor v. A. & B.*, the attorneys were treated as acting in their professional capacity. If Walker was the plaintiff's agent for the purpose of collecting the moneys in question, it was indispensable by law that he should employ an attorney in Ontario in order to

do so, and as it must have been understood by the parties that that was the mode in which the business was to be done, a privity therefore was created between the plaintiff and the attorney so employed : *Story on Agency*, secs. 14, 201, 217 ; *DeBussche v. Alt*, L. R. 8 Ch. D. 286, 310 ; *Shipley v. Kymer*, 1 M. & S. 489 ; *Muanss v. Henderson*, 1 East. 335. As the appellant knew that Walker was merely agent for the respondent he has no lien on the respondent's moneys for any general balance due to him by Walker : *Story on Agency*, sec. 389, note 2, 7th ed.

December 20, 1880. BURTON, J. A.—The case of *Robbins v. Fennell*, 11 Q. B. 248, which was relied upon by the defendant, deciding that a client cannot in England sue the London agent of his attorney for the proceeds of a judgment in the client's favour received by the agent, has, I think, no application to the present, for the reason suggested by Crompton, J., in *Collins v. Brook*, 5 H. & N. 700, that the London agent is the mere servant of the country attorney, and the client has a right to treat every thing which he does as the act of the attorney, in the same way as a banker, and not his clerk or cashier, would be liable for money paid into the hands of the clerk. In the case of *Stephens v. Badcock*, 3 B. & Ad. 354, the receipt of the attorney's clerk immediately gave Stephens, the plaintiff, an action against the attorney ; and in *Robbins v. Fennell*, 11 Q. B. 248, the receipt of the town agent instantly made the attorney responsible ; although Lord Denman intimated an opinion in that case, when the facts were more fully before the Court than they had been in the action, that upon the facts then disclosed, an action for money had and received might probably be sustained on the ground that the town agent had improperly and without authority received the plaintiff's money.

In the present case, it does not appear to me that anything turns upon the circumstance that Walker, the intermediate agent, was an attorney ; the fact is, that he had no power to act as an attorney in this Province, and he

had of necessity to employ a professional man in this Province.

The plaintiffs must be assumed, I think, to have known this when they handed this claim to Mr. Walker, and to have given him a discretion as to whom to employ. He would have been liable to his principal for negligently employing an improper person to act in the collection of the money, but if the attorney so employed had been at the time in good credit, and had subsequently embezzled the money, the loss, I apprehend, would have fallen on the present plaintiffs and not on the intermediate agent.

This then being the relation of the parties, it cannot, I think, be doubted that the principal could at any time before the sub-agent had paid over the moneys to the intermediate agent, intervene and claim the proceeds. I assume, of course, that when the sub-agent has no notice that the money belongs to a third party, but imagines that his immediate employer is a principal, such intervention can only be subject to any payment or set-off which may have been made or may have accrued in ignorance of the fact that the mesne agent filled that capacity.

I think this case comes within the rule referred to by the late Lord Justice Thesiger, in the case cited by Mr. Robinson on the argument, *DeBussche v. Alt*, L. R. 8 Ch. D. 286, that where the exigencies of business render necessary the carrying out of the instructions of a principal by a person other than the agent originally employed, the reason of the thing requires that the general rule should be relaxed so as to enable the agent to appoint a substitute, and on the other hand to constitute, in the interest and for the protection of the principal, a direct privity of contract between him and such principal.

The same rule was acted upon in *Buckley v. Packard*, 20 Johns. 422, so far back as 1821, by the Supreme Court of the State of New York.

I am of opinion, therefore, that the judgment should be affirmed and this appeal dismissed, with costs.

PATTERSON, J. A.—The judgment of the learned Judge, from which the defendant now appeals, proceeds upon the fact, amongst others, that the defendant knew that Walker acted on behalf of the Baylis Wilkes Manufacturing Company or their assignee, and not for himself, in sending the note for collection. That finding of fact is conclusively supported by the evidence; not only by the circumstance that the suit was brought in the name of the company, but by the letters of Mr. Fitch, which are in evidence. Indeed, his defence assumes that fact, for both in his letters and in this action his contention has been that his relation to Mr. Walker is like that of a London agent to the country attorney for whom he acts; that he is accountable only to his immediate principal, and has no privity with the client. He takes that stand, as he has intimated to us, as involving a question of general interest to the profession; and in this he only adheres consistently to the position taken in correspondence, in which he does not claim that he has paid over the money to Mr. Walker, or done anything exactly equivalent to payment, but asserts that no one but Mr. Walker is entitled to call him to account, and that as against him he has a set-off for costs in other matters. He urges this in letters to the attorney in the present suit, who appears to have been instructed by Mr. Hutchinson who had been a member of Mr. Walker's firm, and in a letter dated 22nd September, 1879, to Messrs. Hutchinson and Walker, who seem to have at that time composed the firm which had previously included the Messieurs Doutre. That letter is headed, "*Baylis, Wilkes v. Brown, Paterson,*" and contains these statements, after referring to the account rendered on the 2nd August, 1879:

"The amount of this claim was received in June and placed to your credit, to which account I had charged the various collections placed in our hands, the chief of which was in favour of Mr. Fouringuay, of Arthabaskaville. These claims were of course taken on collection as your agents, and we have of course charged the costs to you."

It may be conceded, without a minute examination of the cases on the subject, that if the relation of the defendant to Mr. Walker or his firm was analogous to that of town agent to country attorney, there would not be such privity between him and the plaintiff as would entitle the plaintiff to maintain this action. The learned Judge of the County Court held that the analogy did not exist, and I am unable to perceive any good reason for saying that he was wrong in that opinion.

His Honour made the following remarks, amongst others, on this topic: "The country attorney in England might, if he pleased, conduct the whole business of his client. He employs a town agent only for his own convenience. But the case here is essentially different. The Montreal attorney could not act in Ontario as an attorney. The employment of a practising attorney in Ontario was therefore a necessity; and when such necessity exists, or by the usages of trade a sub-agent is employed, privity of contract between the principal and sub-agent will generally be implied": for which proposition he cites as authority sections 201 and 387 of *Story on Agency*, 7th ed.

He further observes: "The clients in Montreal when they gave the note to the Montreal attorney, knew that it would be necessary to employ an attorney in Ontario to make the collection. In sending the note to the defendant and giving him instructions, the Montreal attorney must, I think, be taken to have acted as the agent of the owners of the note. The defendant, although instructed by the Montreal attorney, conducted all the proceedings and endorsed them as attorney for the plaintiff in the action; and in the account furnished by him, and for which he professes to have a lien on the money in question, he charges costs in the case as between solicitor and client. * * The judgment was undoubtedly the property of the plaintiff, for whose benefit it was recovered. Had the defendant acted as agent for the Montreal attorney only, the latter would, I suppose, have had some claim to a portion of the costs. No such claim is made by him or admitted by the defendant."

In my judgment these observations point out a clear distinction which, alike upon reason and authority, exists between the position of the defendant and that of a town agent. Nothing that has been shown to us, either in argument or as resulting from any decided case, has led me to perceive that the circumstance that Mr. Walker was an attorney of the Courts of Quebec, placed the matter on any footing different from that on which it would have rested if he had been merely a broker or accountant entrusted with the collection of debts for the plaintiff.

The ordinary doctrines of agency, must, I think, govern; and we find allusions to them in several of the cases cited to us, and in some others, which may be worth noting. Thus in *Collins v. Brook*, 5 H. & N. 700, Crompton, J., says, p. 706: "It is not a rule of universal application that it is necessary to show privity in order to maintain an action for money had and received. There are many cases in which the action will lie, although there is no privity of contract. * * Where an agent is appointed who must appoint a sub-agent, the act of the sub-agent is not necessarily the act of the agent." And Blackburn, J., says, p. 708: "There are cases in which a party employed to receive money is authorized to appoint a third person to receive it. If, in such a case, the person to whom the money is due sues such third person, the question becomes, how, in what way, and under what circumstances, did such party receive the money. In many cases he receives it as agent for the middleman and not at all for the principal. Thus, the clerk of a banker receives money for the banker, and if he were to embezzle the money it would be the loss of the banker, not of the customer; and so in many other cases. Now, in all those cases, when the receipt is such that the loss of the money would be the loss of the middleman, there is, I conceive, no privity between the recipient or third person and the principal; and generally an action would not lie by the latter against the former." Mr. Robinson referred us to this case as putting the test suggested in this passage; but I do not think he was suc-

cessful in showing that upon any thing at present before us, we could assume that the responsibility of Mr. Walker's firm to the plaintiff extended farther than the exercise of proper diligence and care in the choice of an attorney in Ontario.

We are indebted also to Mr. Robinson for a reference to the judgment of Lord Justice Thesiger, in *DeBussche v. Alt*, L. R. 8 Ch. D. 286, in which there is an instructive discussion of the maxim *delegatus non potest delegare*, which the Lord Justice observes, at p. 310, "merely imports that an agent cannot, without authority from his principal, devolve upon another obligations to the principal which he has himself undertaken to personally fulfil; and that, inasmuch as confidence in the particular person employed is at the root of the contract of agency, such authority cannot be implied as an ordinary incident in the contract. But the exigencies of business do, from time to time, render necessary the carrying out of the instructions of a principal by a person other than the agent originally instructed for the purpose, and where that is the case, the reason of the thing requires that the rule should be relaxed, so as, on the one hand, to enable the agent to appoint what has been termed a 'sub-agent' or 'substitute,' * * and on the other hand, to constitute, in the interests and for the protection of the principal, a direct privity of contract between him and such substitute. And we are of opinion that an authority to the effect referred to may and should be implied where, from the conduct of the parties to the original contract of agency, the usage of trade, or the nature of the particular business which is the subject of the agency, it may reasonably be presumed that the parties to the contract of agency originally intended that such authority should exist, or where, in the course of the employment, unforeseen emergencies arise which impose upon the agent the necessity of employing a substitute; and that when such authority exists and is duly exercised, privity of contract arises between the principal and the substitute, and

the latter becomes as responsible to the former for the due discharge of the duties which his employment casts upon him, as if he had been appointed agent by the principal himself."

The law thus authoritatively explained, is the same stated by Mr. Story in the sections of his work referred to by the learned Judge in the Court below, and fully sustains the view adopted by him upon the facts of this case as he found them upon the evidence.

I may refer to two other cases which were not mentioned at the bar, but in which the principles of agency were applied as I think they have been properly applied in this case.

Cahill v. Dawson, 3 C. B. N. S. 106, was an action for negligence in not effecting an available policy of insurance. One Beck, living in Spain, wrote to Dawson at Liverpool to obtain insurance of a cargo of fruit. Dawson wrote to Lewis at London, explaining the circumstances and desiring him to effect the policy; and Lewis employed a broker named Naile, who effected the insurance, and, after the loss, received the insurance money, but refused to pay it over, insisting that he dealt only with Lewis, and that he had a lien on the money in respect of moneys owed to him by Lewis on other transactions. At the trial, at which the plaintiff had a verdict for the full amount of the insurance money, it had not been decided whether or not Lewis had shown his letter of instructions to Naile, the presiding Judge not having considered that question material. In delivering the judgment of the Court, granting a new trial, Williams, J., said, at p. 119: "This being an action on the case for negligence, if that letter had been exhibited to Naile, he could have acquired no right to retain the proceeds of the policy for a claim against Lewis, because he would have known that Lewis was acting merely as agent for Dawson; and the unlawful detention of the money by Naile could not give the plaintiffs a right of action against the defendant for the whole amount so received by Naile."

The other is the very late case of *The New Zealand*

Land Company v. Ruston, L R. 5 Q. B. D. 475, decided by Mr. Justice Field, almost at the same time with the delivery of the judgment now in review. The plaintiff, sued for the proceeds of corn sold by the defendants in London. The plaintiffs had indorsed bills of lading to merchants in Glasgow, with instructions to sell the goods in London; and the course of business was for these merchants to render accounts of sales, deducting a *del credere* commission of three per cent., and remit the balance. The actual sales were made by their indorsing the bills of lading to the defendants at London, who sold the grain, and retained two per cent for their commission as between themselves and the Glasgow merchants. The plaintiffs were aware that sales effected for them by their Glasgow correspondents were made by brokers or agents employed by them; but they were in no way parties to these sub-contracts, and their names were not disclosed upon them, the Glasgow house appearing upon the face of them, not as agents for any one, but as principals. The bills of lading were indorsed only for the purposes of sale and not to pass the property in the goods. The jury found two facts; first, that the plaintiffs did not, through their agents, employ the defendants to sell and account for the proceeds of the corn; secondly, that the defendants knew or had reason to know that their Glasgow employers were acting in the sales as agents for some third persons. The learned Judge held that the latter finding entitled the plaintiffs to sue for the money, and deprived the defendants of the right to set off claims against the Glasgow house arising out of other transactions. He said, at p. 480: "The learned counsel for the defendants, in support of their contention to the contrary, relied upon the cases of *Williams v. Everett*, 14 East 583, *Robbins v. Fennell*, 11 Q. B. 248, and other cases of that description; but upon examination it appears that these cases proceeded either upon different principles, or were decided upon their own particular facts. There is, of course, no doubt that the right of the principal, when he employs the factor and

allows him to sell in his own name, to call upon the sub-agent or vendee, is subject to the right of the sub-agent or purchaser to claim the benefit of any payment or set-off which may have been made or accrued in ignorance of the fact that the mesne agent filled that capacity; but it is also equally clear, that if the sub-agent or vendee knew, or had the means of knowing, that he was dealing, not with a principal, but with an agent for somebody else, no such right exists."

I am of opinion that we should affirm the judgment of the County Court, and dismiss this appeal, with costs.

MORRISON, J.A., concurred.

Appeal dismissed.

FINN v. DOMINION SAVINGS AND INVESTMENT SOCIETY.

Fraud—Principal and agent.

The plaintiff, who applied to the defendants, through one W., their agent, for a loan, requested them by his application to send the money "by cheque, addressed to W." In accordance with their custom to make their cheques payable to their agent and the borrower to insure the receipt of the money by the latter, they sent W. a cheque, payable to the order of himself and the plaintiff. W. obtained the plaintiff's endorsement to the cheque, drew the money, and absconded. The plaintiff swore that he did not know that the paper he signed was a cheque, and there was no evidence to shew that he had dealt with W. in any other character than as the defendants' agent, though whose hands he expected to receive the money.

Held—affirming the decree of PROUDFOOT, V.C., restraining proceedings on the mortgage which the plaintiff had given to the defendants as security for the loan, and directing a reconveyance—that it was W.'s duty to endorse the cheque to the plaintiff, or to see that he received the money, and that the defendants, who had put it in his power to commit the fraud, must bear the loss occasioned thereby.

This was an appeal from a decree made by Proudfoot, V. C.,* restraining all proceedings upon a mortgage given by the plaintiff to the defendants, and directing a reconveyance of the lands, upon the ground that the mortgage money was never advanced to the plaintiff.

The facts are stated in the judgment.

The case was argued on September 15, 1881 (a).

MacLennan, Q. C., for the appellants.

Bethune, Q. C., for the respondent.

* The following judgment was delivered by PROUDFOOT, V. C., at the hearing :—

The only question between these parties here, and upon which this case must turn, is, whether this \$760 is to be considered as proved to have been paid to the plaintiff, or to some one who was entitled to receive it for him, and in that point of view I consider that it is material to ascertain whether Woodman was the agent of the plaintiff, or the agent of the Company, and the conclusion I have come to is, that so far as he was agent for any one, he was an agent for the Company. I have had occasion to consider the position in which these valuers are placed, since the argument of a somewhat similar case that took place recently in Stratford with this Company, and the conclusion I have come to is, that where applications are made for loans by these persons who style themselves "Valuators," and whose valuations are received by the Company, and who receive a commission from the Company for sending in the application, and to whom the Company send the cheques, either directly

(a) *Present*.—MOSS, C.J.A. BURTON, PATTERSON, and MORRISON, JJ.A.

December 20, 1880. PATTERSON, J. A.—The principal office of the defendants is in London, Ont.

The plaintiff had applied to them for a loan of \$1,100, through one Woodman, a lawyer, living in Goderich, who styled himself valuator for the defendants. Part of the loan was to pay off a prior mortgage for \$300, and interest, to one Johnston. The balance was, by the application

to themselves, or jointly with the borrower, in all that class of cases I think the Company must be considered as adopting this valuator as their agent for that particular purpose at all events. Whether he is to be considered as a general agent or not is a different matter, and with regard to that I mean to throw out of consideration altogether the evidence that has been objected to here, as to other loans and other applications and other instances of frauds on Woodman's part, and to confine myself strictly to the evidence that was not objected to, as inadmissible on any ground on which evidence can be objected to.

Now here we find that Woodman was furnished with forms of application for loans, and that he was also furnished with advertisements to be stuck up in his office; there is no pretence that he stole these or came by them improperly in any way; he procured them from the Company, or from the Company's agent here, and they were put up in his office, and he used these forms of the Company for making applications, and he subscribes himself in these valuations as "Valuator for the Company;" and then, what I cannot help considering a very material piece of evidence, in the paper that was drawn up by Mr. Purdom, in Michigan, he is there stated to be the agent of the Company, or to have been the agent of the Company in Goderich. It is not necessary that he should be an agent appointed in writing, and not necessary that he should be appointed under the seal of the Company; it is not necessary that he should have been the sole agent of the Company; if he acts for the Company in receiving an application for a loan, which was the business the Company was engaged in prosecuting, and if the Company, without appointing him under their seal, and without appointing him by a resolution to be their agent, recognize his authority, and if they accept the application, and furnish him with the mortgage to be executed, and take the mortgage from him, I say that that is a sufficient ratification of the authority, a sufficient ratification of his acts to infer a proper and sufficient legal authority for him to act as their agent.

Then the next question is, as to the extent to which his agency extended. He was the agent certainly for the purpose of valuing the property, and according to Mr. Leys's testimony to-day, he was the agent for the purpose of seeing that the money got into the proper hands. The Company did not choose to send the cheque payable to the borrower alone; they sent the cheque payable to the borrower and to their own agent, as I conclude him to have been, not for the protection of the borrower, but for their own protection, to see that the money gets out of their hands into the hands of the person entitled to receive it. Then did Woodman in that case fulfil that duty? Well, laying aside the question of endorsement just now, there is no pretence that he did fulfil it. The cheque never got into the hands of Finn, the borrower. Woodman did not endorse it and hand it over to him, and thereby discharge himself of the duty that he owed to the Company, and which the Company expected himself to perform; so that the Company then have failed to establish that the money has been traced into Finn's hands,

requested to be remitted to the plaintiff "by cheque addressed to J. O. Woodman, of Goderich P. O."

The money was remitted by two cheques, one for \$330, payable to Hugh Johnston and J. Woodman, or order; the other for \$760, payable to James Finn and J. Woodman, or order. Johnston would not accept payment of his mortgage, which was not due, and nothing of importance at

unless in case the endorsement is proved, and I now come to consider this question of the endorsement.

There was no one who saw this done. There is no evidence here, and no witness has proved that they saw Finn sign that paper, make his endorsement on the cheque "C." The evidence of that has to be drawn from different sources, from comparison of handwriting, and from admissions said to have been made by Finn.

As to the comparison of handwriting, I think it proves very little. There are none of the witnesses who were said to be experts, or who would admit that they were experts. One was an agent of a Bank here, who is accustomed to scrutinise signatures, but he denied that he was an expert, or in any sense of the term that his evidence could be admitted in that capacity. Well, Cook was no expert, certainly. He had only seen this man write once, and he did not profess to be able to distinguish the various minutiae in which one signature might be identified as having been written by the maker of another signature; so that there is no evidence of any expert in the matter, and any one of us is just as well qualified to determine upon the comparison of the writing as they could be; and I admit that comparison of the writing may be sufficient to establish a signature, although no one else, although no other witness can be found who saw it written. But it is to be borne in mind that this signature is denied by the person who is said to have signed it; and the experts say, and all that they can say is, that the one signature resembles the other, and that is only what would have been expected in a case of forgery. Indeed, the more skilful the forgery the more nearly the signatures would resemble each other.

Then there is the question of the admissions, and as to that, evidence has been given to some considerable extent.

With regard to the evidence of Finn himself, the value of any admissions made by him must of course depend a great deal upon his capacity to understand the questions that were being put to him, and his ability to explain the meaning he had in the answers that were given or that he wanted to give to them; and it is quite plain to any person who has seen him examined here to-day that he is a man of very limited capacity. I do not see anything in his manner, I do not see anything in the evidence that has been given to lead me to suppose that he desired to give false testimony. I think he is quite innocent of any attempt of that kind, and that the evidence that he has given must be scrutinised or looked at with the notion that he was giving it honestly. Now, he does not pretend to vary much from the other witnesses as to what took place in Johnston's office. His evidence is, that they showed him a paper, and asked him if it was his name, and he said it was. He said it was his signature and that it looked like it, but he didn't think it was. Now the very material difference between Finn and Leys and Purdom is in that expression, they asked me if it was my name, and the others say, if it was my signature? In that respect Johnston corroborates Finn, and

present turns on the subsequent history of the \$330 cheque. It never formed a payment to the plaintiff. It appeared that there was another mortgage for \$200, which had been made by the plaintiff to Johnston, but had been assigned by him to one Middleton, and which was overlooked in arranging for the loan. It was the subject of some of the evidence at the hearing, but does not require further notice

he says the question was if it was his name, and then afterwards they asked about his signature. Now, when a person is going to be saddled with the serious consequences resulting from the proof of the signature of his name by admissions proven to have taken place in this way, I think it is necessary that the admissions should be most clearly proven and established by the most unequivocal testimony, and that there should be no discrepancy in the evidence in regard to them. Johnston was present at this conversation. Leys and Purdom were under the impression that there was a most unqualified admission of his having signed that paper. Johnston left the meeting, finished the meeting with the conviction that there was an unqualified denial of his signature to that paper. Johnston's evidence upon that subject is this— from the talk in my office I was satisfied the plaintiff had not endorsed the cheque, and that he had not meant to admit that he endorsed the cheque. I think it would be very dangerous indeed to admit evidence of that uncertain kind to establish a liability upon the plaintiff here. Johnston's evidence has been remarked upon as being not reliable; singularly enough he is almost the only witness who was examined on the subject who is disinterested; he has no interest whatever in the transaction so far as we can see, and his evidence substantially corroborates that of the plaintiff; and I must say that some of the expressions used by Mr. Leys went strongly to corroborate what the plaintiff says, which I will refer to at present. At this meeting he says that the plaintiff said it looked like his signature certainly, but he had never signed that paper; that he had signed another paper which Woodman had brought to him, brought to his house in the country, and which was signed on the road, and that that was the only paper he had signed in connection with it; that it was not like this paper; that it was a sheet of foolscap, and therefore the inevitable result was that he never could have signed this cheque. Leys tells us that he admitted having signed this cheque, but he also tells us that he said he had signed a larger paper; it was a larger paper he had signed. Now, what could be the meaning of that unless something more had taken place such as Johnston represents to have taken place; something that Finn had claimed that he had not signed, and the paper he had signed was a much larger paper, a sheet of foolscap. I must fancy Mr. Leys has forgotten, and has failed to recollect that particular line in the conversation which Mr. Johnston does recollect; and besides Mr. Johnston being wholly disinterested, so far as I can see, there is no evidence whatever to impeach his credibility, to impeach his character, his honesty, or his desire to tell the truth. I do not think that this offer that he is said to have made, or that he did make, in fact, to buy the mortgage and take an assignment of the mortgage, or advising them to sell, at all impeaches that, because he tells us how it was done, that it was made after Mr. Purdom had assured him that, he could prove the payment of the money. Mr. Johnston says: "Very well, if you can do that, the plaintiff is entirely mistaken. The plaintiff is either trying to cheat you, or he is forgetting. If you can

now. The controversy related to the \$760 cheque. It seems certain that the money for it never reached the hands of the plaintiff. It was obtained by Woodman, who presented the cheque, indorsed, or appearing to be indorsed, by himself and by the plaintiff. The plaintiff asserts that his signature was forged by Woodman; and the learned Vice-Chancellor was not satisfied by the evidence that it was genuine.

prove payment of the money I will take an assignment of the mortgage; if it is all right, I will take an assignment of the mortgage; or I will procure some person to buy under your power of sale." And such seems to have been the course that Johnston took in the matter; I do not see there anything to impeach his candor or to lead me to doubt the credibility of his testimony.

I may remark that the plaintiff's capacity is attempted to be substantiated by the character of his letters to Johnston—I do not so read them; there was one letter in which he had written to Mr. Johnston to look after his mortgages, as he had been served with a writ and a notice of sale. Now if the plaintiff had been a man of such acuteness and capacity, he would have known that that was perfectly useless. That the writ and the notice of sale given by these subsequent mortgagees could have had no effect on Johnston's securities at all. That they were the first securities, and therefore whether they sold or turned him out of possession was a matter of perfect indifference to him (Johnston), so that there was really no sign of acuteness, rather a sign of simplicity, I think, in the plaintiff in having thought it necessary to notify Johnston of the fact.

With regard to that \$50, I am not inclined to think that the plaintiff has been guilty of any erroneous statement in the affidavits he has made; the statements in these affidavits are that he had not received any portion of the money from the Company, and it is true that he had not received any portion of the money from the Company. He had borrowed a sum from Mr. Woodman, by some arrangement between them that it was to be repaid by the money that came from the Company, but it was not the Company's money that the plaintiff got; probably if the whole circumstances had been stated it would have had a greater appearance of candor, but I do not know that in substance, it would have been anything different from what it does appear upon these affidavits. Woodman himself does not seem to have considered that he was bound to take it out of the money from the Company, and he attempted to put off a due bill on the plaintiff for this same sum.

So that I think upon the whole that the plaintiff has fairly made out a case for the relief that he asks by his bill, and it is a case, in which he ought to be entitled to his costs; he asks to restrain the action by the defendants, and the notice of sale by the defendants, and he establishes, according to the conclusion I have come to upon the evidence, that he has never received the money upon which the action and proceedings are being taken.

I will therefore grant an injunction, perpetual, against the action, and against the notice of sale.

The decree will be declaring the defendants entitled to the \$50, and the sum paid for interest on the prior mortgages, but not to the amount of the cheque for the \$760; and there will be the usual decree for redemption by the plaintiff, with the costs of suit to plaintiff.

There were two questions of fact contested at the hearing, and again before us. One was, the position of Woodman. Was he to be regarded as agent for the plaintiff or for the defendants in negotiating and effecting the loan? The Vice-Chancellor arrived at the conclusion that he was agent for the defendants, and we entirely agree with him in that finding. It is therefore unnecessary to discuss in detail the evidence upon which it rests.

The other question was, the genuineness of the plaintiff's indorsement upon the \$760 cheque. Upon that question we have not been able to take the same view of the evidence. The evidence was of the kind usually given when there is no direct proof of the actual signature. Mr. Dunsford, the bank manager in Goderich, comparing the signature with others, some of which were admitted to be genuine, and some of which were proved to be so and had been ultimately admitted by the plaintiff, who had at first denied or hesitated to admit them, was of opinion that they were all written by the same person. Mr. Cook, the Division Court Clerk thought so too. Mr. Leys, the secretary of the defendants, and Mr. Purdom, their solicitor, gave similar testimony; but it was probably not such as ought to be relied on as evidence of comparison of handwriting, because those two gentlemen had formed their opinion that the plaintiff signed the name from other circumstances.

There was no conflicting evidence on the question of comparison. The evidence given, whatever its value may have been, was all the one way. We have ourselves looked at the papers, and have not in our own minds any doubt that the signatures on the several papers are written by the same hand.

Looking at the original papers, I observe that whoever prepared the copies, as printed, has thought it proper to correct the plaintiff in matters of spelling, punctuation, and capitals, and has thus put before us, as copies of the plaintiff's letters, something unlike what he actually wrote.

Besides the comparison of handwriting, evidence was

given of admissions by the plaintiff that he had indorsed the cheque. If the proof had depended on this part of the evidence there would have been strong reasons, some of which have been pointed out by the Vice-Chancellor, for hesitating to act upon it. For my own part, I do not think the plaintiff is shewn to have ever clearly admitted the signature; although my idea is, that he was not always prepared to directly deny it, and rather tried to convince himself, by reasoning from circumstances, that, while he could not dispute having signed a paper at Woodman's request, this was not the paper.

The plaintiff's story is, that Woodman stopped at his house in his buggy, and asked him to sign a paper, telling him that the money would then come at once, and that he signed it on the seat of the buggy, as Woodman could not leave his horse to come into the house. But he said it was a larger paper than the cheque, and that Woodman told him it was a discharge of Johnston's mortgage.

We are told by more than one witness that the plaintiff is not a man of much business capacity. That was the Vice-Chancellor's opinion of him, and it is obvious from the whole history. One witness, who seems to have known him well, Mr. George Hawkins, said of him: "He is not a business man at all; I think he is a little light in the head, and not right."

It is not at all unlikely that Woodman, telling the plaintiff of the arrival of the cheque, would talk of getting Johnston's mortgage discharged, which was the destination of part of the loan. In fact I should infer that a good deal must have been said, either then or at some time after the loan was arranged, by Woodman to the plaintiff about it; because from the plaintiff's own evidence it appears that he had the notion that the whole loan of \$1,100 was to come into his hands, and he seems to have thought at one time that he could expend the whole \$1,100 in improving his farm. But, whatever Woodman may have said about the discharge, it is not easy to understand how or why he should have talked of the plaintiff signing the

discharge. It would of course come from Johnston. It seems impossible to avoid the belief that the plaintiff misunderstood, or failed afterwards to remember correctly what Woodman said about the discharge; and that in trying to convince himself that this endorsement is not what he signed that day, he has confused the conversation about the discharge with the request to sign the paper that was to produce the money.

But, while our finding is that the plaintiff did indorse the cheque, how far is that fact conclusive against his present claim to have the mortgage discharged?

He never received any of the money. Woodman embezzled it and absconded. The plaintiff had received from Woodman, in advance of the arrival of the cheque, two sums of \$20 and \$30. The defendants now say that these sums ought to be treated as so much of the mortgage money; and, although they had a good deal of the character of loans from Woodman, it is not objected, on the plaintiff's part, to regard them as received from the defendants.

The cheque is indorsed by Woodman after the plaintiff. The plaintiff was examined as to whether Woodman's name was on the paper he signed, and he did not recollect that it was.

The fact would therefore seem to be that, when the plaintiff indorsed the cheque, it had not been indorsed by Woodman. One would not expect it to have been otherwise, unless Woodman took it to the plaintiff for the purpose of handing it over to him; but if that had been his purpose he would not have wanted the plaintiff's indorsement on it. The ordinary course would have been to leave the man who was to draw the money to indorse the cheque when he went to the bank.

It was suggested in argument that a reason why the plaintiff may have indorsed the cheque to Woodman, and why Woodman may have required that to be done, was to secure Woodman the repayment of the \$50 he had advanced. There is no evidence to support this conjecture.

If Woodman had been dealing honestly, it is far more likely he would have told the plaintiff to come in and get his money, and would have gone with him to the bank to draw it; and there is a little inconsistency between the suggestion and the defendants' contention that the \$50 was *their* advance, for on that hypothesis Woodman would have been drawing the money as their agent.

Then consider the form of the cheque.

It was payable to Woodman's order as well as to that of the plaintiff. It was made in that form because the defendants did their business in that way. The application only asked that the money be remitted by cheque *addressed* to Woodman, not *payable* to Woodman. Had the word been "payable," it would not have made much difference, because the application was filled up by Woodman, and he signed the plaintiff's name to it. The plaintiff knew nothing of what it contained. The defendants make their cheques payable to the order of their agent jointly with that of the borrower, for greater safety. They seek in this way to ensure the receipt of the cheque by the borrower, and depend upon the agent indorsing it to the borrower. That was not done in this case by Woodman. The case of the defendants is not that Woodman indorsed or gave the cheque to the plaintiff, but that the plaintiff indorsed it to Woodman to enable Woodman to draw the money, and so adopted Woodman for that purpose as his agent. I confess I cannot see any sound reason for such a conclusion. We have found that Woodman was the agent of the defendants. The plaintiff dealt with him in that character. He looked to him, as representing the defendants, to pay him the money for which he had given his mortgage. He signed the cheque, no doubt, and he signed it as something which he was told he had to do so that he could get the money; but that he had any idea that he was thereby dealing with Woodman in any other character than that in which, up to that moment, he had dealt with him is mere conjecture. It is only by force of the rule which attributes to a man who does an act a knowledge

of the nature of what he is doing, that we treat the plaintiff as knowing that the paper was a cheque. There is no direct evidence of it, and from what the plaintiff swears as to his idea that he was asked to sign a discharge of his own mortgage, it may be doubted if we ought to assume that he knew the effect of indorsing the paper, even if he knew it was a cheque.

The facts seem to me to be, that the plaintiff dealt with Woodman only as agent of the defendants: that he relied upon receiving from the defendants, through Woodman's hands, the money he had borrowed: that he signed the cheque supposing it to be a necessary step towards getting the money: that Woodman's duty to the defendants was to indorse the cheque to the plaintiff, or to see that the money reached the plaintiff's hands: and that he fraudulently neglected that duty. The defendants who, by making the cheque payable to Woodman, put it in his power to commit the fraud, must bear the loss. Having made a distinct act of their agent essential to the plaintiff's power to receive the money, and having adopted this method as a precaution in their own interest, it would, to my apprehension, be unjust to subject the plaintiff to the consequences of the agent's fraud, without at least shewing that the agent had done the act prescribed, or that the plaintiff had knowingly accepted as sufficient that which was done.

The appeal should be therefore dismissed, with costs; the plaintiff undertaking to pay the defendants, or to allow the defendants to set off against so much of the costs, the sum of \$50 with interest from the time of its receipt from Woodman, and also any moneys paid by the defendants on the prior mortgages.

MOSS, C. J. A., BURTON, and MORRISON, J. J. A., concurred.

Appeal dismissed.

HORNER V. KERR ET AL.

Married woman—Separate estate.

Held (reversing the judgment of the County Court of York), that the rents derived by a *feme covert*, married before 1859, from real estate acquired by her in 1865, were her separate estate.

Quære, per BURTON, J.A., whether a married woman can be liable on a joint contract.

Per BURTON, J.A.—Where an action is brought against the two makers of a joint and several note, if it fail against one it must fail as to both.

APPEAL from the County Court of the county of York.

The plaintiff declared upon a joint and several promissory note made by John C. Kerr and his mother Hannah Kerr. The latter defendant pleaded her coverture (the only plea which need be noticed,) to which the plaintiff replied that she was and is possessed of real and personal separate estate in which her husband had or has no legal or equitable interest.

The case was tried before the Judge of the County Court of the county of York, without a jury.

It appeared that the marriage was in 1847. In 1865 or 1866 Mrs. Kerr acquired a farm of 98 acres. She said 12 acres were deeded to her by her husband's aunt, and 86 acres she bought from her husband's brother. There were no title deeds or other documents produced.

She swore that when she bought the 86 acres she had no money. She first gave a mortgage, whether on the 86 acres or the whole 98 acres did not appear, for \$1,400 or \$1,540, out of which she got \$200 cash, and afterwards a mortgage for \$1,800, out of which she got \$400 cash. The \$200 went to pay a debt, and the \$400 to take up a note. There were four mortgages on the place, the husband having executed the first one, and one about a year ago for \$130 or \$140. Such at least was the statement in one place, although in another she said, "I mortgaged the property a little over a year ago, I think; my husband had nothing to do with that transaction." The husband had

lived for four years five miles away from where his wife lived, though there was no understood separation between them ; and during his absence Mrs. Kerr obtained an order allowing her to execute a mortgage alone, on the ground that they were living apart by mutual consent.

When the note was made, and for some time before, how long was not clear, the farm was occupied by a son of Mrs. Kerr (not the son who made the note), as her tenant, at the agreed rent of \$150 a year, which he had not paid. Mrs. Kerr had had stock and implements on the farm, which when she let it to her son she sold to him for \$500, to be paid by building on the place. She had some furniture, which belonged to her before 1859.

A verdict was taken at the trial against both defendants, with leave reserved to move for a verdict for the married woman or a nonsuit as to her, if the Court should be of opinion that the plaintiff was not entitled to recover against her ; and the learned Judge, having in term come to the conclusion that the plaintiff was not entitled to recover against her, entered a nonsuit generally.

The plaintiff appealed.

The case was argued on the 18th November, 1880 (a).

Reeve, for appellant. No matter what the decision of the Court may be in reference to the liability of Hannah Kerr, we are entitled to hold the verdict against the other defendant, her son. At the trial a verdict was entered against both with leave reserved to move for a nonsuit as against Mrs. Kerr only, and the verdict against the son should not have been disturbed. We do not contend that the property which was acquired by Mrs. Kerr after 1859, was her separate property, unless it became such under the order she obtained enabling her to convey it under R. S. O. ch. 127, but it is quite clear that the rents which she derived from the property were her separate estate : *Lawson v. Laidlaw*, 3 App. R. 77.

J. W. Kerr, for the respondent. Under the replication the appellant was bound to prove that the respondent had an estate in which her husband had no interest, legal or equitable: *Johnstone v. White*, 40 U. C. R. 309; *Standard Bank v. Boulton*, 3 App. R. 93. It is submitted, however, that respondent's husband had a joint estate with her in the lands in question, inasmuch as they were married before 1859, and the property was acquired afterwards, and the statute therefore did not interfere with the rights of the husband under the Common Law: *Emrick v. Sullivan*, 25 U. C. R. 105; *McGuire v. McGuire*, 23 C. P. 123; *McCready v. Higgins*, 24 C. P. 233; *Brown v. Winning*, 43 U. C. R. 327; *Field v. McArthur*, 27 C. P. 15. The *onus* was on the appellant to shew that the husband had no interest in the land, which he utterly failed to do. When Mrs. Kerr signed this note her husband was living with her. It cannot be held that the rents derived from this property were her separate estate. The learned Judge was right in entering a nonsuit as to both, as the action on the note proceeded all through as a joint action.

Reeve, in reply. The decision in *McCready v. Higgins*, 24 C. P. 233, was on the ground that the husband had reduced the property into possession before 1859.

December 20, 1880. BURTON, J.A.—The plaintiff declares upon a joint note made by the defendants, one of whom, by a plea added by leave of the Court, sets up her coverture as a defence.

It is urged that the verdict as regards the defendant John C. Kerr should have been allowed to stand, and it is taken as one of the grounds of appeal that to that extent at all events the judgment appealed from is erroneous, but I am not of that opinion. If the learned Judge was right in his conclusion that the verdict could not be sustained against one of two joint contractors, it must necessarily fail as to both. There is one exception to this rule, viz., when one of the joint contractors is discharged from liability by matter subsequent to the making of the contract, and which

operates only to protect him or her individually, leaving the contract in other respects in full force, as for instance by discharge in bankruptcy.

It was stated at the bar that the note sued on was a joint and several note, and such would appear by reference to the note itself to be the fact, but that cannot now affect the question. The plaintiff had a right to treat it either as a joint or separate contract. He has treated it as a joint contract, and sued them together. I am not aware of any statutory changes which would sanction his suing them in one action if he had elected to treat it, as he might have done, as a separate contract.

Looking at the peculiar mode in which the liability of a married woman upon her engagement is worked out, it may perhaps be questionable whether she can, strictly speaking, be liable on a joint contract, but no such point was raised.

The question therefore resolves itself into whether the learned Judge was right in holding that there was no evidence to support the replication to the defendant Hannah's plea of coverture, that she was possessed of real and personal property which was her separate estate, in respect of which the engagement was entered into.

In this case the defendant was married before 1859. The land she owned was acquired subsequently and before the passing of the Act of 1872, and the learned counsel for the plaintiff, conceiving himself bound by the decisions, and that they were applicable to such a case as that under review, conceded that he could not contend that the real property constituted separate estate within the meaning of the Married Woman's Act. It becomes unnecessary therefore to consider that question, but he urged that money derivable from the rents of the land was clearly separate estate.

Mr. Kerr upon the authority of a dictum in *Emrick v. Sutherland*, 25 U. C. R. 105, as to the effect of section 13, which as has been said recognizes not only the estate of the husband as tenant by the curtesy, but also some other estate (as the provision in reference to liability for his debts

would otherwise be meaningless), and upon the further ground that the statute being in derogation of the common law must be construed strictly, propounded the rather startling proposition that in cases of women married before 1859 and acquiring property subsequently, the husband must still be held to have a joint estate with the wife during coverture; or, in other words, that all the legislation in reference to women of that class is nugatory.

If the maxim he referred to be applied as it was by the late Chief Justice of this Court in *Kræmer v. Glass*, 10 C. P. 470, it will be very harmless so long as those entrusted with the interpretation of our statutes feel themselves bound to ascertain the true intention of the Legislature from the words used, read in their natural and ordinary sense, and give effect to it whatever may be their opinion of its wisdom or policy. "Every provision of these statutes" he says, at p. 475, "is a departure from the common law. And so far as is necessary to give these provisions full effect we must hold the common law is superseded by them. But it is against principle and authority to infringe any further than is necessary for obtaining the full measure of relief or benefit the Act was intended to give."

There can be no doubt that that is a true exposition of the law, but whilst entirely agreeing with it, I cannot avoid quoting in the same connection the remarks of Mr. Sedgwick, at p. 274 of his book on the Construction of Statutes, 2nd ed., "that though it will long no doubt be familiar to the forensic ear that statutes in derogation of the common law are to be strictly construed, there is really no reason whatever why the innovating statutes of our day should be regarded with any peculiar severity, or be subjected to any particularly stringent rules of interpretation because they abrogate some ancient rule of that renowned, but somewhat obsolete system of jurisprudence."

Any statute, the effect of which would be to take away, change, or diminish rights of property, or liberty, no doubt should be strictly construed, and it is the duty of Courts under such circumstances to guard the individual and

prevent his personal rights being taken away by any means that are not strictly legal.

To this extent I agree that statutes should be construed strictly, but they are also to be construed sensibly and with a view to the object aimed at by the Legislature.

Mr. Sedgwick goes on to observe: "Can it be doubted by any one that the common law rule as to women's rights was barbarous, and in the highest degree unreasonable and unjust?" The legislation on the subject may not have been perfect, but the general intent and object of our Ontario statutes are plain beyond the possibility of doubt or question.

The Act of 1859 does not affect the rights of the husband previously to its passing, except in those cases where he had not taken possession of his wife's property; the husband if so disposed could reduce his wife's property into possession. With that exception the Act dealt only with future marriages and after acquired property.

These so called vested rights of the husband, the Legislature evinced a clear intention to abolish when it professed to give to married women the right to hold and enjoy their property free from the control of the husband, and from his debts and obligations. What stronger words could be used? Why then should not full effect be given to that intention and the law liberally construed to that end?

It may not be easy to understand precisely what was meant by section 13, but it is manifest that the Legislature when it declared that every woman married before the 4th of May, 1859, should after that date, notwithstanding her coverture, have, hold, and enjoy all her real estate not then taken possession of by the husband, free from the husband's control or disposition, did not intend that the husband should still be entitled to the freehold interest which he would have had at common law in his wife's lands during the coverture, and which in effect put the ownership during that period entirely in his power; and this is rendered still more plain, if that were necessary, by the express reservation of the husband's rights as tenant by the curtesy.

It does appear certainly to be rather an anomaly in legislation to declare in one statute that the wife shall enjoy these lands free from the control of the husband, and in another to make his concurrence essential to the validity of any alienation by her, whether in fee or of a more limited character, leaving it in the power of the husband to interfere with the free enjoyment of the property which the statute professes to give to her, but that is matter which does not directly concern us at present. The tenant in the present case has occupied the wife's land with her permission for a certain term, and rent has accrued to her by reason of such occupation. The husband has no interest in this rent and no power to interfere with it, but the wife has under the Act of 1872 a separate right of action in respect of it.

I am of opinion, therefore, that the material allegations in the replication are proved, and displace the defence of coverture, and that the verdict for the plaintiff should be restored, and this appeal allowed with costs.

PATTERSON, J.A.—The only question upon this appeal is, whether the defendant, Hannah Kerr, a married woman, who, as surety for her son, joined him in making the promissory note on which the action is brought, had separate estate with reference to which she can be held to have contracted.

The learned Judge of the County Court seems to have considered that the fact of the marriage having taken place before 4th May, 1859, excluded the property from the operation of the statute of 1859, (22 Vict. ch. 34; C. S. U. C. ch. 73); and he cites *Dingman v. Austin*, 33 U. C. R. 190, as having decided that the statute applied only to marriages which took place after its passing. This is a misapprehension of the effect of that decision. In *Dingman v. Austin* there were two circumstances co-existing: the marriage was before 1859, and the land in question had also been acquired by the wife and actually taken possession of by the husband before 1859. It was held

that his common law rights remained, and were not impaired by the Act of 1872, (35 Vict. ch. 16, O.) It was not decided, nor did the facts make it necessary to decide, that property acquired after 1859 by a woman who was married before that date would not, under the statute, vest in her in exactly the same way as if she had not been married until after the 4th of May, 1859.

The personal property, which seems to have consisted only of what furniture remained, would of course belong to the husband, as it was acquired before the statute; and the inquiry thus comes to be confined to the realty and the rent.

The second section of the Married Woman's Property Act, R. S. O. ch. 125, legislates respecting married women who on or before 4th of May, 1859, married without any marriage contract or settlement, a class which clearly includes Mrs. Kerr; and respecting the real estate of such women, not taken possession of by their husbands on or before the said 4th of May, 1859, which as clearly describes the land now in question, as neither wife nor husband had possession or ownership of it till 1865; and also respecting their personal property not on or before the said day reduced into the possession of their husbands, which will not include the furniture, because it was reduced into the husband's possession before the 4th of May, 1859; and it provides that every such woman may from and after the said day, notwithstanding her coverture, have, hold, and enjoy all such real and personal property, whether belonging to her before marriage or in any way acquired by her after marriage, free from her husband's debts and obligations contracted after the said 4th of May, 1859, and from his control or disposition without her consent, in as full and ample a manner as if she were sole and unmarried.

The beneficial enjoyment of the property by the wife, free from control by or liability on account of the husband, was thus vested in the wife by the statute of 1859, in several sections of which, as *e. g.* secs. 14 to 19, the property is expressly designated separate property. It was, how-

ever, decided in *Royal Canadian Bank v. Mitchell*, 14 Grant 412, which was followed in other cases, that the statute did not confer upon the wife that complete control and power of disposition which were necessary to create the kind of separate property which, under the law of the Court of Chancery, became chargeable for her general engagements.

Mr. Reeve, for the plaintiff, has disclaimed, both in the Court below and before us, any intention to reopen that question in this case. We are, not, therefore, called upon to consider whether the law, in view of the legislation which has taken place since *Royal Canadian Bank v. Mitchell* was decided, or for any other reason, should now receive a different interpretation.

The plaintiff contents himself with insisting upon the rent reserved, payable, and overdue to Mrs. Kerr, as being property entirely within her control, and with reference to which she may properly be taken to have contracted when she made the note in question. There does not appear to be any reasonable answer to this. A married woman enjoying, free from the control of her husband, her real estate, which under the Act of 1859, or the second section of the Revised Statute, she is empowered to do, and having, as for the sake of the present argument may be assumed, no power to dispose of it without his concurrence, and therefore no power to make it liable to answer her general engagements, may accumulate the profits it yields and hold them as her separate personal property. Those profits would come within the direct decision of this Court in *Lawson v. Laidlaw*, 4 App. 77, and none the less so because they might happen to be invested for the moment upon the personal security of some person, or in other words, be represented only by a *chose in action*. Proceedings to recover them would be in her own name, under section 20 of R. S. O. ch. 125. They would be her "separate property," under section 25, which provides for the distribution of her "separate personal property" in case of her intestacy, and they would, as pointed out by Mowat, V.C., in *Chamberlain*

v. *McDonald*, 14 Gr. 447, be at her own uncontrolled disposal during her life.

It seems, from the opinion expressed by the learned Judge in delivering judgment in the Court below, that he reasoned, from the reading of section 5 of the Revised Statute, which he quotes, that because it is there expressly declared that a woman, married *since 4th of May, 1859*, shall enjoy her property separate from her husband, that rule cannot extend to those married before that date. His attention does not appear to have been directed to section 2, which is the one applicable to the circumstances of this case. This is doubtless what led to his adopting the view on which he acted.

The appeal should be allowed with costs, and the rule discharged.

MORRISON, J.A., concurred.

Appeal allowed.

IN RE BEATY, AN INSOLVENT.

Insolvent Act of 1875—Sale of security—Right to prove.

Under the Insolvent Act of 1875, a creditor holding security at the time of the insolvency cannot realize the security, and prove on the estate for the balance.

Re Hurst, 31 U. C. R. 116, commented upon.

This was an appeal from a decision of the Judge of the County Court of the county of York, holding that the claimants, the Imperial Bank, who had sold part of their security after the assignment in insolvency, were entitled to prove on the estate for the balance of their claim. The facts are set forth in the judgment.

The case was argued on the 23rd September, 1880 (a).

Merritt and *George T. Blackstock*, for the appellant, the assignee. The contention that the bonds were held only as security for the advance of \$18,000, is not supported by the evidence, which conclusively shews that they were hypothecated for the general indebtedness. Such being the case, the learned Judge was clearly wrong in allowing the respondent to prove for the balance due him, as under the Insolvent Act of 1875, if a creditor realizes on his security after the insolvency, he cannot come in and prove for any deficiency. See sections 84, 87, 125. The learned Judge relied upon the cases of *Re Hurst*, 31 U. C. R. 116, and *Re Bestwick*, L. R. 2 Chy. D. 485; but the first case was virtually overruled by the decision of this Court in *Deacon v. Driffil*, 4 App. R. 335; and the latter case was decided under the English Act of 1869, which expressly permits a creditor to adopt the course which the respondent followed here.

Bain, for the respondent. The amount which the learned Judge held we were entitled to prove against the estate

(a) *Present.*—MOSS, C.J.A., BURTON, PATTERSON, and MORRISON, JJ.A.

for, was the balance of the general account, which was an unsecured debt, as it is abundantly clear that the securities held by the bank, and on which they realized, were only applicable to the loan of \$18,000. But even if the security was held in respect of the full amount of the bank's claim, the authorities shew that our right to prove for the balance has not been lost by selling the bonds: *Re Gwillim*, 34 L. T. 55; *Ex parte Geller*, 2 Madd. 262; *Re Bestwick*, L. R. 2 Ch. D. 485; *Ex parte Moffatt*, 2 M. D. & DeG. 170; *Ex parte Moore*, 2 D. & C. 7; *Ex parte Rolfe*, 3 M. & A. 311; *Robson on Bankruptcy*, 298. This was the view taken by the Queen's Bench in *Re Hurst*, 31 U. C. R. 116, which is binding on this Court, being the decision of what was then the Court of Appeal in insolvency cases. In *Deacon v. Driffl*, the question was not decided as contended by the appellant, nor was it necessary for the decision of that case.

December, 20, 1880. BURTON, J.A.—It does not appear, so far as I can ascertain upon the papers before us, exactly when the insolvency took place, although I have ascertained from official sources that it was on the 5th July, 1878. On the 17th July, 1879, Mr. Wilkie, the cashier of the Imperial Bank, who are the claimants in this matter, and whose claim is the subject of the contestation now in appeal, made an affidavit of claim setting forth that the insolvent is indebted to the claimants in \$11,451.84, being a balance due upon advances made by the claimants to the insolvent, and in respect of promissory notes discounted by the claimants to the insolvent, and upon and in respect of a covenant contained in a mortgage made by the insolvent in their favour.

There is no statement of account annexed to the affidavit—nothing whatever to show how much is claimed in respect of advances: how much in respect of discounts: nor how much on account of the covenant. I need scarcely say that this is not the kind of affidavit contemplated by the statute, which requires the creditor to state, with

reasonable particularity, the amount due upon each separate item of account; and the affidavit is, moreover, essentially defective in not shewing that the insolvent was so indebted at the time of the execution of the deed of assignment, or of the issue of the writ of attachment, and so continued, to the extent of the claim sought to be proved, at the time of filing the claim.

The form P, given in the statute would seem to countenance this lax form of proof, but is not warranted by the sections of the Act 80 and 87, and it was no doubt intended, when the form directs that the claimant should here give the nature and particulars of the claim, that he should state, among such particulars, when the debt was incurred, and when payable, so that the assignee and creditors entitled to contest it might upon the face of it be informed that it was a claim entitled to rank on the estate, and also that the necessary rebate of interest might be made should it prove to be payable after the insolvency commenced.

The claim proved here gives no such information, and for anything appearing on the face of the affidavit, the debt may have been incurred subsequent to the insolvency, or may be made up in great part of interest subsequently accrued.

The affidavit affords no information, nor is there anything upon the papers to show how the balance thus claimed, over \$11,000, was arrived at. The balance actually due to the bank, as shewn by the statements appended as exhibits now, would seem to be only \$9,833.66, for which sum the claim has been allowed by the learned Judge of the County Court.

The affidavit then proceeds not, as the statute directs, to negative that they hold any security except that specially referred to, but in these terms:

“The claimants hold a security for the claim, binding the Northern Railway of Canada to the amount of £700 stg., which I am informed are worth but 35 cents in the \$, but which have in reality no market value at present, and

I cannot, therefore, place a value thereon, being third preferential bonds of the said railway company."

Although a number of objections were taken to this claim, the arguments before us were confined to two, viz., the right of the claimants to realize a portion of these securities since the insolvency, and the omission to place a value upon those they at present hold.

It was contended in answer that the securities so held were specially held for an advance of \$18,000, for which the claimants did not seek to prove, the balance of that claim having been paid from the proceeds of the property mortgaged to Gzowski, and that no question therefore could arise as to the sale of the 36 bonds held by the bank and which they had disposed of since the insolvency; and some of the evidence is directed to shew that an account of this \$18,000 advance was kept distinct from the other portion of the indebtedness—with what success it is not necessary to enquire—as the hypothecation notes clearly shew that these bonds were deposited as collateral for all advances, and it is by no means clear that the moneys realized from the mortgage were applicable to the \$18,000. The bonds, although originally deposited as security for the \$18,000, with a separate stipulation that any surplus should be applied on the general indebtedness, were differently dealt with by the note of 27th May, 1878, which treats the \$18,000 as a new advance in addition to an advance of \$14,795.02 heretofore advanced, and the trusts on sale are to apply the proceeds to the payment of the advances *heretofore made, and this day made, and that may hereafter be made.*

It is clear, therefore, that the collaterals apply to both advances, and we are driven to consider whether a claimant holding security from an insolvent at the time of his insolvency is at liberty to realize his security, and rank for the balance, or whether he must by taking such course be held to have made his election, and to have debarred himself from ranking on the estate.

Whilst a creditor holding security is not bound to come

in under the insolvency proceedings, but may realize his securities in any way he thinks proper, he must, if he prove, comply with the Act by valuing his security and ranking only for the difference. The question is, whether this requirement of the Act applies to him when the insolvency occurs, or when he seeks to avail himself of it by proving his claim. In other words, whether, having notice of the insolvency, he is then bound to decide whether he will enforce his securities without resort to the insolvency proceedings or not.

In some cases the security is of such a nature as to give the creditor no right to realize independently of the assistance of a Court of Equity, and we had incidentally to consider such a case in *Deacon v. Driffl*, 4 App. R. 335. although it did not become necessary there to decide the question now before us. The attempt there was in effect to prove for the costs of the equity proceedings and interest, subsequent to the insolvency.

The decisions in England to which we have been referred do not render us much assistance. Under the earlier statutes in England no proof whatever was allowed to be made by a creditor who held a security for his debt on the bankrupt estate. This was from time to time relaxed, and eventually a practice grew up under which it was held that creditors might realize a pledge without the authority of the Court without destroying their right to prove. If any fraud were shewn it might be made the subject of enquiry, and if the sale were an improvident one, the remedy of the assignee was held to be an action of damages for the injury thereby done to the estate. *Ex parte Geller*, 2 Madd. 262; *Ex parte Rolfe*, 3 M. & A. 311; *Ex parte Moffatt*, 1 M. D. & DeG. 283, affirmed in 2 M. D. & DeG. 1070, are cases of that description. What had previously been a mere practice of the Court was given statutory effect to by the Act of 1869. Section 12 of that Act expressly reserves to creditors holding security their right to realize. If, therefore, the security is of such a nature that had no bankruptcy occurred he would have been able

to realize his security in order to satisfy his claim, he may still do so notwithstanding the bankruptcy, and the assignee in bankruptcy may, if he is dissatisfied with the manner in which it has been realized, file a bill in equity, or apply to the Court of Bankruptcy.

It is worthy of note that whilst under the English Act the secured creditor may realize the security and prove for the deficiency, or may give up the security and prove for the whole, or may value his security and prove for the balance, there is this distinction between that Act and our own, that the trustee is not entitled to take the security at a fixed sum beyond the value placed upon it by the creditor, but may, if not satisfied, take means to have the value more accurately ascertained; but in any case, if the security prove to be more valuable than the amount at which it has been assessed, the trustee is entitled to any surplus over such assessed value as the security on being realized produces, whilst if the security prove less valuable than the creditor had supposed, he will not be permitted to increase his proof.

Our Legislature has adopted a different course, and has enabled the assignee for the benefit of the estate to take over the security at the valuation of the creditors plus ten per cent., whilst if left in the hands of the creditor at his own valuation, he becomes entitled to any surplus that may be obtained over the assessed value, and is subject to bear any loss.

In re Hurst, 31 U. C. R. 116, the majority of the Court, under the Act of 1864, held that the mere fact of a creditor having realized his securities since the insolvency did not necessarily debar him from ranking on the estate.

The grounds upon which the majority there proceeded may furnish an argument for amending the laws so as to give this additional right to a creditor, but I am unable to convince myself that the Act then under consideration or the present will bear any such construction, or that we are at liberty to import into them a provision not to be found there. I think, at all events, in dealing with a case aris-

ing under the Act of 1875, it is rather to be assumed that our Legislature, having before it the English mode of procedure and the scheme adopted by the Act of 1869, deemed it fairer to all concerned to leave the creditor to place a value on his security, with the option to the assignee to take it, and confined him to that mode of procedure. The present case furnishes a good illustration of the wisdom of such a provision. Securities of this nature fluctuate greatly in value. The holder might be quite willing to take what he could then realize for the bonds, having a right to rank on the estate for the difference; whereas, if the question had been submitted to the creditors, they might have possessed information which rendered it prudent for them to acquire them with the prospect of an early increase in value. By the sale the creditor has placed it out of the power of the assignee to exercise this option.

I think that, upon a proper construction of the Act, persons in the position of creditors holding security at the time of the insolvency, are bound to make their election, and that if they choose to realize on their securities they cannot prove on the estate, as they have voluntarily placed it out of their power to perform the condition on compliance with which they alone become entitled to rank.

I am of opinion, therefore, that this appeal should be allowed, with costs, and the proof expunged.

PATTERSON, J. A.—The assignment in insolvency was made on the 5th July, 1878. The materials before us do not enable us to say with certainty what the debt due to the Imperial Bank amounted to at that date. There are two statements amongst the papers. One of them charges the item of \$18,000 as lent to the insolvent on the 29th May, 1878, and adds to it \$145.97 for interest to the 5th July, making \$18,145.97. This computation is made for the purpose of deducting from it a sum credited as proceeds of bonds sold. I shall refer to that by and bye. At present I use the statement merely as containing the

claim that \$18,145.97 was the amount of this particular debt at the date of the insolvency.

The other statement begins with the debit of \$14,795.02, as a balance of accounts certified as of 22nd May, 1878, and, after various other debits and some small credits, shows a balance of \$15,647.18.

This balance is not shown as due on the 5th July, as it contains items amounting to over \$700 under later dates. For my present purpose, however, I will take it that these may be merely the dates at which the charges were made in the account, and assume that the balance shown was the true balance of the general account at the date of the insolvency.

We find in this way that the debts for which the Imperial Bank might have proved, were \$18,145.97 and \$15,647.18, making together \$33,793.15.

The bank held as security forty-three Northern Railway bonds, each for £100 stg., of which thirty-six were second preferential bonds, and seven were third preferential bonds; and also a second mortgage upon property of the insolvent in Toronto.

The bank did not prove in the insolvency proceedings until the 17th July, 1879, more than a year after the insolvency. In the meantime the thirty-six second preferential bonds had been sold at 79 per cent., and the land comprised in the mortgage had been sold under the first mortgagee as the result of a suit for foreclosure which had been begun before the insolvency, and the bank had received the purchase money which remained after paying off the first mortgage and the costs, the net amount being \$10,228.99. This amount is noted as having been received from the Court of Chancery on the 1st of May, 1879.

We have no precise information as to when the bonds were sold. Mr. Wilkie, the cashier of the bank, says in his evidence that they were sold some time in 1879. In the first statement I have mentioned, the sum of \$13,730.50 is credited as the proceeds of the bonds against the item of \$18,000 with interest computed to the 5th July, 1878,

the date of the insolvency, and this appears to be credited as of that date, which was long before the bonds were sold. I do not know how this is explained, but it is not a matter of any consequence at present.

The judgment from which the present appeal is brought by creditors, allows the proof of the bank for \$9,833.66, a sum which is obviously the result of adding together the two balances which I have mentioned, viz., \$18,145.97 and \$15,647.18, and deducting the two sums realized from the bonds and the mortgage, viz., \$13,730.50 and \$10,228.99—without any adjustment of interest or other interference with the amounts as given.

It is not the same sum for which the proof was actually made, and the composition of which I have not been able to understand from any explanation offered in evidence.

The proof is made by Mr. Wilkie on behalf of the bank. It is for "\$11,451.84, being the balance due upon advances made by the claimants to the insolvent, and in respect of promissory notes discounted by the claimants to the insolvent, and upon and in respect of a covenant contained in a mortgage made by the insolvent to the claimants." The affidavit, which is made on the 17th July, 1879, is in the present tense, stating that the insolvent *is* indebted, &c., and it refers to the security in these words: "The claimant holds a security for the claim binding the Northern Railway of Canada, to the amount of seven hundred pounds sterling, which I am informed are worth but thirty-five cents in the dollar, but which have in reality no market value at present, and I cannot, therefore, place a value thereon, being third preferential bonds of said railway company."

The result of these proceedings, which I have been thus particular in stating, is that the right is assumed to realize the securities after the insolvency, and without reference to, or concert with the assignee, or so to realize such of the securities as may be readily convertible into money, and then prove for the balance of the debt as unsecured, or as

secured only by such of the securities as have not been realized.

This is the contention upon which the learned Judge in the Court below decided in favour of the bank, resting chiefly, as I understand his judgment, upon the authority of *Re Hurst*, 31 U. C. R. 116. He also appears to have considered that section 106 of the Insolvent Act of 1875, which had no equivalent in the Act of 1864, under which *Re Hurst* was decided, was intended to embody the doctrine acted on by the majority of the Court of Queen's Bench in that case; and that the provisions of section 106 did not materially differ from those of section 40 of the English Bankruptcy Act of 1869, which permit a creditor holding specific security on the property of the bankrupt or any part thereof, on giving up his security, to prove for his whole debt, and also to receive a dividend in respect of the balance due to him after realizing or giving credit for the value of his security. Taking this view of the effect of our statute, the learned Judge naturally treated the English decisions under section 40, and those respecting the similar rule which had obtained in England before the Act of 1869, as authorities which we should follow—such cases, *e.g.*, as *Ex parte Geller*, 2 Madd. 262; *Re Gwillim*, 34 L. T. 55; and *Re Bestwick*, L. R. 2 Chy. D. 485.

We have to be careful, as we have before this, when discussing matters connected with insolvency, had occasion to point out, not to be misled by an apparent similarity in language or in principle between English laws and our own, when a careful reading may show a clear distinction. This is particularly incumbent upon us in comparing recent laws; because if we find our Legislature, while enacting a law upon a subject covered in England by a statute lately passed, in full operation, and whose provisions must be presumed to have been considered by our law makers, adopting language different from that employed in the English statute, we are bound to assume it to have been so adopted advisedly and with the object of

expressing precisely the rule which we are to follow. In the present instance the English statute is of recent date ; but, if I correctly understand the matter, the provisions of section 40 may be regarded as re-enactments of rules which had previously been in force ; some of them having been formulated in an order of Lord Loughborough, made on the 8th March, 1794, which was itself a declaration, with some modification, of a practice which had existed from a still earlier date : *Eden on Bankruptcy*, 105. We had in the old province of Canada, in the Bankrupt Act of 1843, a provision somewhat resembling section 40, but yet not permitting the creditor to realize his security at his own option, or to give credit for its estimated value. He was permitted to require a sale of the security under the direction of the commissioner, and to rank for the balance of his debt ; or to release his security and rank for the whole ; but unless he took one of these courses, he was not allowed to prove any part of the debt for which he held security.

What we learn by referring to these earlier laws is, that from the remote time when a creditor holding security was, in England, debarred from ranking for any part of his debt, there have been efforts]made to set the scales of justice more evenly between the]secured creditor on the one hand and the unsecured creditors on the other, but that the mode in which this is to be worked out must be sought in the letter of the laws for the time being in operation.

We must look to the terms of our own Act for the rule by which we are to be guided.

By section 84, the secured creditor was, in his claim, to specify the nature and amount of his security, and was therein, on his oath, to put a specified value thereon ; the assignee, under the authority of the creditors, was at liberty to consent to the retention of the security at the specified value or to require an assignment of it at ten per cent. advance upon that estimate ; and in either case the difference between the specified value and the amount of the

claim was expressly stated to be the amount for which the creditor was to rank and vote.

This enactment was also contained in the Act of 1864, and in *Re Hurst*, 31 U. C. R. 116, it was held that (as I copy from the headnote) the mere fact of the sale of the security did not necessarily exclude the creditors from proof, but that the securities sold might yet be valued, and if the estate had not been prejudiced, or were recompensed for any loss thereby, they should still be allowed to prove.

I do not care at present to form a speculative opinion as to what would be the position of a creditor who had in fact realized his security, but who nevertheless framed his proof as it would have been framed if the security were still in his hands. If the assignee elected to permit him to retain it, no necessity might arise for inquiring whether he had sold it or not; but if it was valued so low as to tempt the creditors to require an assignment of it, there would doubtless be a possibility of embarrassment. Any case of the kind would have to be dealt with upon its own circumstances. It might perhaps be found that the doctrine of *Re Hurst* might be so far applied, that a sale of the security before proof need not in all cases debar the creditor from proving. But, as I intimated on a former occasion, I cannot assent to the proposition that we may substitute another rule of procedure for that prescribed by the statute, shifting the responsibility from where the statute places it, and substituting for the option which the statute gives to the creditors, the necessity of litigation if they are dissatisfied, and the burden of proving that the sale has been made at a sacrifice.

But section 106, while it adds the new right—new, that is, in our present (or late) system, though we had it in the province of Canada under the Act of 1843—of releasing the security and proving for the whole, and while it repeats the provision of section 84 concerning the affidavit setting a value upon the security, contains no suggestion of approval of the creditor himself proceeding before proof to realize his security; but explicitly declares that

sum of \$14,795.02 as theretofore advanced, and \$18,000 as advanced on that day, and pledges the bonds to secure those debts and any further advances the bank should thereafter make.

Now if we treat the \$18,000, which is the same money mentioned in the October memorandum, as originally advanced in May, as purported by the May instrument, we exclude it from the mortgage security of February, which was not prospective.

Whether it is to be treated as advanced at one date or the other, the effect of the May agreement is clearly to pledge the bonds for the debts in general *pari passu*.

There is no way of looking at the matter which enables us to treat any part of the debt as unsecured at the date of the insolvency.

If the mortgage secured the \$18,000, then the bonds, even on the terms of the October pledge, secured the other debts to the extent of the surplus which would remain after applying the value of the mortgage.

If the mortgage did not secure the \$18,000, then the other debts were secured by it, or some part of them was so secured.

If the mortgage and the bonds were together security for the general accounts, including the \$18,000, which seems to have been the real position of the matter, then there was no pretence for treating any part of the debt as unsecured.

The mortgage having been turned into money, as happened ultimately to be the case, there may have been no difficulty and no risk in fixing its value as of the date of the insolvency at the time when proof was actually made; but its value had been diminished, or may have been diminished so far as we can say, by the costs of the litigation, of which \$160 were the costs of the bank. Whether the assignee, if regular proof and valuation had been made, would have been directed by the creditors to take an assignment and redeem the prior mortgagee, must now, of course, be a matter of speculation only.

I find no ground on which the proof in its present shape can be supported, and therefore concur in allowing the appeal.

MORRISON, J.A., concurred.

NOTE.—When judgment was delivered Moss, C.J.A., was absent on account of illness, and the parties consented to accept the decision of Burton, Patterson, and Morrison, JJ.A.

MEMORANDUM.

The Honourable THOMAS MOSS, Chief Justice of Ontario,
died at Nice, on the 4th of January, 1881.

FRYER V. SHIELDS ET AL.

Insolvent Act of 1875, sec. 63—Privileged claim.

Held, reversing the judgment of the Queen's Bench, 45 U. C. R. 188, that privileged claims are not within the class of debts mentioned in the 63rd section of the Insolvent Act of 1875, to which a discharge does not apply without the consent of the creditor.

THIS was an appeal from a judgment of the Court of Queen's Bench, which affirmed a judgment of Mr. Justice Galt upon a demurrer to the plaintiff's replication, reported 45 U. C. R. 188.

The plaintiff declared on the money counts; to which the defendants pleaded a discharge in insolvency under a deed of composition and discharge, duly confirmed, by the terms of which they were to pay a composition of thirty cents in the dollar. And the plaintiff replied that his claim was privileged under the Insolvent Act of 1875, being for two months' wages as commercial traveller for the defendants, and was scheduled as such by the defendants: that the order confirming the deed was made on the 18th of September, 1879; and that the defendants procured from the official assignee on the 24th of September, 1879, a reconveyance of all their property and effects, which were ample to satisfy the plaintiff's claim, to one Strathy, upon certain trusts for the defendants; and that, except a composition of thirty per cent. which the plea alleged to have been left with the assignee for the plaintiff, the defendants did not pay the plaintiff his claim; and that the assignee had not, since the 24th of September, 1879, had any property or effects of the defendants out of which the Judge might order payment of the plaintiff's claim.

The question was whether, under the facts so set out upon the record, the insolvents were discharged as against the plaintiff.

Mr. Justice Galt held that the defendants were not discharged; reading section 63 of the Act as declaring that a discharge under the Act should not apply, without the express consent of the creditor, to any privileged debt; and a majority of the Judges of the Court of Queen's Bench, Mr. Justice Armour dissenting, agreed with that opinion.

The defendants appealed.

The case was argued on the 12th January, 1881 (*a*).

W. Mulock, for the appellants. The debt sued for was duly set forth by the appellants in the insolvency proceedings in the manner pointed out by the 61st section, and it is completely barred by the discharge, unless it comes within the exceptions to which the 63rd section applies. But upon the true reading of this section, it is submitted that it was not intended to except privileged debts from the operation of a discharge. Under the 92nd and 93rd sections the respondent had a complete remedy against the assets of the estate if he had exercised it at the proper time; but having notice, he allowed the estate to pass into the hands of third parties.

G. Kerr, Jr., for the respondent. The respondent's claim was not discharged by the deed of composition. The whole scope of the Act clearly shews that the Legislature intended to exclude a privileged creditor from voting for or against a deed of composition, and therefore it is plainly enacted by the 63rd section that the claim of such a creditor shall not be affected by the deed of discharge. It is not alleged by the plea that the respondent expressly consented to his claim being discharged by the deed, and without such consent his claim cannot be affected. He referred to the Insolvent Act of 1875, secs. 60, 61, 62, 63, 91; *McMaster v. King*, 42 U. C. R. 409, 3 App. R. 106; *Dredge v. Watson*, 33 U. C. R. 165; *Ex parte Humphreys*, 3 D. & Ch. 115; *Ex parte Gough*, 3 D. & Ch. 189; *Thomas v. Williams*, 1 A. & E. 685

(*a*) *Present*.—BURTON, PATTERSON, and MORRISON, JJ.A., and OSLER, J.

March 1, 1881. PATTERSON, J. A.—I think the construction of the section adopted by Mr. Justice Armour gives its proper effect to the language employed, and is in harmony with the scheme and principle of the statute.

The declaration which Mr. Justice Galt supposes the 63rd section to contain, is certainly not to be found there in direct terms. The words are, "A discharge under this Act shall not apply, without the express consent of the creditor, to any debt for enforcing the payment of which the imprisonment of the debtor is permitted by this Act, nor to any debt due as damages for assault or wilful injury to the person, seduction, libel, slander, or malicious arrest, nor for the maintenance of a parent, wife, or child, or as a penalty for any offence of which the insolvent has been convicted; nor shall any such discharge apply without such consent to any debt due as a balance of account due by the insolvent as assignee, tutor, curator, trustee, executor or administrator under a will, or under any order of Court, or as a public officer."

This is the whole list of debts to which in its direct terms the section declares the discharge shall not apply, and it does not include any privileged debt. A privileged debt is one which is entitled to be paid out of the assets in priority to the general creditors, as in the case of clerks and persons in the employ of the insolvent, who, under sec. 91, are to be collocated, by special privilege, in the dividend sheet, for certain arrears of salary or wages. Rent does not come within the class of privileged debts; but when there are goods on which the landlord, but for the insolvency, might have distrained, and on which therefore he has what is called in section 74, a preferential lien, the debt for rent becomes to that extent privileged: *Re Kennedy*, 36 U. C. R. 471; *Re McCracken*, 4 App. 486. The privilege is thus a position of advantage in relation to the estate, not to the person of the insolvent. The distinction created by the first part of section 63, which is the part I have quoted, in respect of the debts there enumerated, has reference to the person of the insolvent, and not to his

estate; and it is appropriately attached to those debts, none of which are of the kind ordinarily contracted by a trader in the course of his business, except perhaps those which may be enforced by imprisonment under section 136, and those are not debts resulting from fair trading. They all rank for dividends with the general debts, and have no privilege on the estate; but, inasmuch as the personal liability of the insolvent for them is not to be destroyed by his discharge, they are, with obvious propriety, excluded from computation amongst the debts the creditors whereof can, by a certain majority, affect the rights of others who do not assent.

This is the effect of the second part of section 63 to which I now pass on. It extends the same exclusion to privileged debts, and with equal propriety, because those debts are to be paid in full, if there are assets to do so. The words are: "Nor shall debts to which a discharge under this Act does not apply, *nor any privileged debts*, nor the creditors thereof, be computed in ascertaining whether a sufficient proportion of the creditors of the insolvent have voted upon, done, or consented to any act, matter or thing under this Act."

So far there is not a hint that the discharge is not to apply to privileged debts: on the contrary, while nothing would have been simpler than to add the words, "nor to any privileged debt" to the list enumerated, no such words are there, and the passage I have just quoted keeps the two classes of debts distinct.

There is, however, a third part of section 63, which is relied upon as having the effect of saving the privileged debt from the operation of the discharge. It is in these words: "But the creditor of any such debt may claim and accept a dividend thereon from the estate without being by reason thereof, in any respect affected by any discharge obtained by the insolvent."

This passage has been adapted from section 100 of the Insolvent Act of 1869, without very careful attention to the force of the language employed in making the adaptation. Section 100 differed from the present section 63 in

several particulars, some of which were pointed out by the late Chief Justice of Ontario in his judgment in *McMaster v. King*, 3 App. 113. It may be useful again to refer to its effect, as illustrating the meaning of section 63. It dealt with three classes of debts. To one class it declared that a discharge should not apply without the express consent of the creditor, *unless the creditor should file a claim for the debt*. To the second class it declared, absolutely, that the discharge should not apply without such consent. The third class comprised the privileged debts, and was dealt with as in the second part of section 63. In short, section 63, down to the end of the second part of it, is a verbatim copy of section 100, with the omission of the words "unless the creditor thereof shall file a claim therefor." The change, so far, from the one form of language to the other had the object and effect of making, as in section 63 only one class of debts to which it is expressly declared that a discharge shall not apply without consent; whereas in section 100 there were two classes, the first of which was only excepted from the effect of the discharge, on condition of the creditor abstaining from ranking on the estate; but both sections agree in excluding from computation all debts to which the discharge was not to apply, *and also* privileged debts. But section 100, having left open to the effect of the discharge the first series of the debts enumerated if the creditor elected to rank for them, had to deal, in the closing clause, with only the debts absolutely excepted. It declared accordingly that "the creditor of any debt due as a balance of account," &c., (enumerating the second series of debts,) "may claim and accept a dividend thereon from the estate, without being, by reason thereof, in any respect affected by any discharge obtained by the insolvent." There could be no pretence that this clause contained any allusion to privileged debts. In adapting it, however, in section 63, which included as one class the debts that had formed the two series in section 100, in place of enumerating again all the excepted debts, the words "any such debt" were used; and that expres-

sion, being wide enough to extend to the privileged debts as well as the others, has furnished the ground for the present litigation.

We thus see how the clause came to assume its present shape. The object of the change was obviously to permit the creditor to prove and receive dividends for all, and not only for part, of those debts to which the penal consequence of exception from the discharge was expressly attached; and it ended there. The status of the privileged creditor had been defined without the least ambiguity, and the slight change of language in using the phrase "any such debt" to avoid the statement in detail of the excepted debts previously enumerated, while it happens to be less precise, because privileged debts had been mentioned and the strict grammatical force of the words would therefore include them, cannot be taken to convey a change of policy respecting them.

The comparison of the two sections seems to me quite conclusive against the contention on the part of the respondent, but I should have thought the internal evidence of section 63 calculated to shew that the last clause was meant to refer only to the debts enumerated in the first clause, and not to privileged debts which were to be paid in full, and which, if so paid, would be *ipso facto* discharged. The use of the word "dividend," which is usually employed with reference to debts sharing on equal terms, supports this view, whether we confine it to dividends proper or extend it to include a composition; although it cannot be said to be inaccurate to speak of dividends on a privileged claim, inasmuch as the estate may not suffice to pay in full all claims of that class, or may be only gradually realized, and so afford in the first place only a dividend, though ultimately paying these debts in full.

But, after all, the enactment merely is that the creditor shall not, *by reason of claiming and accepting a dividend*, be affected by the discharge. To understand this as a declaration that the discharge shall not affect the privileged

creditor without his consent would be, in my opinion, to supplement the language to an extent only justifiable by necessity for so reading it in order to make it harmonize with the scheme of the law as manifested by other sections. We should have to disregard the significant omission of privileged debts from the detailed list; the express mention of them and of the detailed debts as two classes; and the light derived from the comparison with the Act of 1869; besides making the clause say what is not said by its terms.

The argument for the respondent has accordingly been that the reading is required to make the Act consistent with itself, or to avoid doing injustice to the privileged creditor.

I cannot see any such necessity. I think the contrary is the result of a fair interpretation.

Section 61 declares that the confirmation of the discharge of the debtor shall absolutely free and discharge him from all liabilities whatever, except such as are *specially excepted*, existing against him, and provable against his estate, &c. The liabilities discharged clearly include a privileged debt, unless it is specially excepted by section 63. That section does not in terms except it, as we have seen; and, after this reference to specially excepted debts in section 61, it would be attributing only a very moderate degree of skill to the draftsman to suppose that he prepared with so much care the list of express exceptions, and left this one to be imported into it by inference.

The pertinency of this observation is enforced by a reference to section 52, which requires the assignee to certify certain things for the information of the Judge on an application for the confirmation of a discharge, shewing, amongst other particulars, the debts over \$100, which have been proved, "and whether from their nature they will be affected by the proposed discharge or composition and discharge." It never can have been intended that in this list the assignee is to treat any claim as in his judgment *inferentially* excepted by section 63, when section 61,

makes the discharge cover all but those *especially* excepted, which I understand to mean declared in express terms to be unaffected by the discharge.

There is really no reason why the discharge should not apply to the privileged debt. It is to be paid in full if there are assets. It is strictly a business debt; and no ground has been suggested, or is to be gathered from the Act, for giving it any greater advantage over other business debts than the right of preferential payment. This advantage is given out of consideration for the clerk, not by way of penalty on the insolvent, who is not blamed for happening to owe it; and no intention appears, nor is any reason apparent, for attaching to its non-payment the penal effect of a continued liability, when the discharge frees the insolvent from all other business debts honestly incurred.

The apprehension of injustice to the privileged creditor arises from the idea that, in one event, namely, the execution of a deed of composition and discharge, the assignee must, under section 60, reconvey to the insolvent all his estate; and that so these creditors may lose their privilege and be forced to come in with the general creditors, and be content with the composition. I do not think, for reasons which I shall presently explain, that that is the necessary effect of section 60; but if it were so, I should hesitate before holding that that circumstance should modify what would otherwise be the plain meaning of sections 61 and 63.

The privilege is created only by the direction of section 91, that clerks, &c., shall be collocated, by special privilege, *in the dividend sheet*, for arrears of salary to a limited extent. If the Act were to be read with critical attention to its language—a method which, as has frequently been pointed out, could not be fairly applied to it—then, as dividends and dividend sheet are both superseded by the composition which restores the estate to the insolvent, a clerk insisting on his privilege might be embarrassed by a challenge to point to the precise enactment which, under those circumstances, secured it to him.

My own opinion is that the privilege is intended to continue, notwithstanding the composition; but I deduce this from the general scope of the provisions on the subject as much as from the specific force of section 91. The language of that section would not appear to be literally applicable when the distribution of the estate is taken from the assignee, if we read it very closely. But, having regard to the policy and scheme of the Act, we may apply to this section a principle like that on which our Courts have construed the reference to the landlord's lien for rent in section 74. Literally, that section merely professes to restrict the lien to rent falling due within a limited time; but we have treated it, in conjunction with the restriction on the power to distrain deduced from section 125, as recognising and in effect creating a lien for rent otherwise unknown to our law. So section 91, while it contains only a direction, in a matter of procedure, to the assignee, may be treated as recognising the arrears of salary as a first charge on the estate. This is in accordance with the more general expression, "*rank as ordinary creditors*," used at the end of the original section—that is, before the addition made to it by 40 Vic. ch. 41—where, after extending the privilege to two months' (altered by 40 Vic. ch. 41, to one month's) salary for services which the clerk was bound to perform under the assignee, it is added, "and for any other claim they shall rank as ordinary creditors," which is equivalent to the words "be collocated as ordinary creditors."

Section 59 provides that in case a composition is not paid, when the discharge is conditional upon payment, the assignee shall immediately resume possession of the estate and effects of the insolvent, in the condition in which they shall then be; but that the creditors holding claims which were provable before the execution of the deed shall not rank, vote, or be computed as creditors concurrently with those who have acquired claims subsequent to the execution, &c., thereof, for any greater sum than the balance of composition remaining unpaid; but after such subsequent

creditors have received dividends to the amount of their claims, then the original creditors shall have the right to rank for the entire balance of their original claims then remaining unpaid; and shall be held, for all purposes for which the proportion of creditors in value require to be ascertained, to be creditors for the full amount of such last mentioned balance. This clause treats all the original creditors alike. If it has clerks or employes at all in view, it ignores their privilege. I take it that it is framed on the assumption that they have been paid off out of the estate before the assignee handed it over to the insolvent. In any other view it would deal unfairly with the clerk who is obliged to work for a month after the insolvency, if required by the assignee, and who might thus be put off with a dividend for this compulsory service.

When we find the clerk and his debt excluded from the computation of the majority necessary to give the discharge, it would be very clear language upon which we should feel compelled to hold that he lost his privilege against the estate by the effect of an arrangement in which he was not allowed to interfere or to count as a creditor.

By section 47 the assignee, when he prepares his final account, is to state, *inter alia*, the amount of claims proved, dividing them into ordinary, *privileged* or secured, and hypothecary claims, the amount of dividends or of composition paid, &c., privileged claims being thus indirectly recognised, even after there has been a composition.

Then, if the privilege remains, is the power to enforce it lost, after a composition, by the direction of section 60, to the assignee to reconvey the estate to the insolvent?

We have to some extent anticipated this question in *Re McCracken*, 4 App. 486. We there considered that the power to dispose of the estate, given to the creditors or inspectors by section 36, did not enable them to prejudice the landlord's preferential lien for rent; and that therefore the assignee, who had sold the estate on credit in obedience to a direction from the creditors, was liable to be ordered

to pay the rent ; although, of course, entitled to indemnify himself out of the assets when realized.

It is acting on the same rule of construction to hold that when section 60 makes it the duty of the assignee, when a deed of composition and discharge has been executed, to "reconvey the estate to the insolvent," it refers only to the estate which was in his hands liable to be distributed among the creditors who now, in place of dividends, are to receive the composition. That is all the estate in which the compounding creditors have any interest ; and therefore all that, by accepting the composition, they can set free. Section 52 is consistent with this view. I have already referred to one of its provisions. It further requires the assignee to state in his certificate the ratio of dividend declared and likely to be realized out of the estate for the unsecured creditors. This is evidently for the purpose of putting the Judge, as well as the non-assenting creditors, in a position to consider whether the composition offered is a fair equivalent for the estate they are giving up. Therefore, when the composition is accepted, the estate released must be the same on which the assignee's estimate of probable dividends was founded—not the estate applicable to the payment of preferred claims, which were neither to share in the dividends nor to count in the composition.

In the present case the estate is shewn to have remained in the hands of the assignee until six days after the confirmation of the discharge. I do not think of anything which should have hindered the plaintiff from insisting on payment of his claim out of the estate, either before or after that event, or which may have justified the assignee in handing it over to the insolvents without paying him. And therefore, in my judgment, there is no necessity for in any way straining the language of section 63 to make it except privileged debts from the effect of the discharge, or to exclude those debts, as being specially excepted, from the operation of section 61.

The plaintiff, in my opinion, must fail in this action. Whether he may yet have a remedy, or what remedy he

may have, against the assignee personally, or against the estate in the hands of the insolvents, we have not now to decide. It is plain that we cannot make any amendment, as we were asked to do, with a view to the prosecution of any other remedy in the present suit. Parties not now before us would have to be added, and we have not on this demurrer any materials before us upon which the question of amendment could be discussed.

I think we must simply allow the appeal, with costs.

OSLER, J.—The question is, whether the defendants' deed of composition and discharge, duly confirmed under the Insolvent Act of 1875, discharges the plaintiff's privileged claim for two months' arrears of wages.

The claim was inserted in the defendants' schedule of liabilities, and proved by the plaintiff as a privileged claim.

After the confirmation of the deed of composition and discharge, the assignee, without making any provision for paying this claim, reconveyed the whole estate of the insolvents in accordance with the terms of the deed.

I am of opinion with Mr. Justice Armour, in the Court below, that the confirmation of the discharge is an effectual bar. The plaintiff contends that the 63rd section of the Act exempts privileged claims from the operation of the discharge. That section is not a model of legislative expression, and in *McMaster v. King*, 3 App. R. 106, Moss, C.J.A., while recognizing the rule that unless the language fairly admitted of a proposed construction, that construction must be rejected, remarked that the Insolvent Act "is not a piece of legislation to which it is safe to apply nice verbal criticisms. Its language must be interpreted to a certain extent at least with reference to ordinary commercial usage, and it is always necessary to keep prominently in view its objects and policy."

The terms "privilege," and "privileged creditor," are always used in the Act to denote a special right, or creditor having such right, to be paid in full out of the estate, and never indicate the reservation or retention of a personal

right against the insolvent himself, unless that effect can be attributed to them upon the construction of the 63rd section.

There is nothing in the Act which exempts a privileged creditor from the necessity of proving his claim in the same manner, and to the same extent, as an ordinary creditor, and his right to rank as such is subject to contestation and appeal: section 95. His claim, therefore, is one which must be adjudicated upon and disposed of in the insolvency. As it must be paid in full before the claims of other creditors, the terms dividend and composition are inapplicable to it, and for the same reason it would be unjust that the privileged creditor should have a voice in the conduct of the proceedings, or in the disposition of the estate, for as his claim must be paid in full, the surplus, and that only, belongs to the general creditors. This appears to follow from the reasoning of Moss, C. J. A., in *Re McCracken*, 4 App. R. 486, when dealing with the 'preferential lien' of the landlord for rent.

The privileged creditor is thus in a different position from the creditors of other debts specially mentioned in the 63rd section. His clear right is to be paid in full out of the assets of the estate so far as they will extend.

These considerations may assist us in arriving at what I venture to think is the proper construction to be placed on the 63rd section, which is of course to be read in connection with section 61. The latter section enacts that the confirmation of the discharge of a debtor shall absolutely free and discharge him from all liabilities whatsoever existing against him, and provable against his estate, except such as are thereafter, *i. e.*, in the 63rd section, specially excepted. That section provides that a discharge under the Act shall not apply without the consent of the creditor to certain specified debts, among which, however, privileged debts are not included; and then proceeds, "nor shall debts to which a discharge under this Act does not apply, nor any privileged debts, nor the creditors thereof," thus distinguishing one class of debts from the other, while grouping them

for the purpose of the next succeeding clause, "be computed in ascertaining whether a sufficient proportion of the creditors of the insolvent have voted upon, done, or consented to any act, matter or thing under this Act." So far the section presents no difficulty. The debts which have been specially excepted from the operation of the discharge, and the privileged debts, are alike placed under the same disability, if I may use the expression, and for the obvious reason that the former are still enforceable against the debtor, notwithstanding his discharge, while the latter are to be paid in full out of the estate. Then follows the last clause of the section: "But the creditor of any *such debt* may claim and accept a dividend thereon from the estate without being *by reason thereof* in any respect affected by any discharge obtained by the insolvent."

I think that the words "such debt," in this clause, must be held to refer to a debt which, in the earlier part of the section, has been specially declared to be exempt from the operation of the discharge, and do not mean a privileged debt, to which, as I have already pointed out, the term dividend is not appropriate. The words 'without being by reason thereof in any respect affected by any discharge,' can only receive their full effect by holding that they relate to a debt which, though excepted from the discharge, might but for this provision be included in it if the creditor accepted a dividend thereon. In other words, the clause is a declaration that the debts which are not affected by the discharge may, notwithstanding, rank upon and claim a dividend from the estate without thereby losing their character of undischarged debts.

That privileged debts are only mentioned in the section for the purpose of providing that they shall not, any more than the debts which are declared not to be barred by the discharge, be computed in ascertaining the proportion of creditors, may be inferred from the position they occupy in the section, for had it been intended that they should also be excluded from the operation of the discharge, it would be more natural to have included them in the general

enumeration of the debts which are in terms embraced in that class.

In support of this construction it is legitimate to compare the section in question with the corresponding section of the Act of 1869. That section provided that a discharge under the Act should not apply without the express consent of the creditor (1) to any debt for enforcing payment of which the imprisonment of the debtor was permitted by the Act, nor to any debt due as damages for assault, or wilful injury to the person, seduction, libel, slander, or malicious arrest, nor for maintenance of parent wife, or child, or as a penalty for any offence of which the insolvent had been convicted, *unless the creditor should file a claim therefor*; (2) nor should any such discharge apply without such consent to any debt due as a balance of account due by the insolvent as an assignee, tutor, curator, trustee, executor or administrator under a will, or under any order of Court, or as a public officer. The debts thus enumerated are the same as those mentioned in section 63 of the Act of 1875, and, as in that section, they are described in separate clauses, but those in the first clause were discharged if the creditor proved a claim. Then followed the same provision as to privileged debts and debts not discharged not being subject to be computed in ascertaining the proportion of creditors, &c.; and lastly, a clause that the creditors of the second class of debts removed from the operation of the discharge might claim and accept a dividend thereon without being by reason thereof in any respect affected by any discharge obtained by the insolvent.

In the Act of 1879, the words "unless the creditor shall file a claim therefor" are omitted, and it seems to me impossible to resist the conclusion that the Legislature in doing so, while retaining the language of the Act of 1869 as to privileged debts, intended only to place all the debts specially excepted from the discharge on the same footing as to the right to claim and accept a dividend from the estate.

The 125th section gives the privileged creditor an ample

remedy against the assignee for enforcing his claim ; nor do I say that he is restricted to his remedies under that section if the assignee transfers the estate without providing for the privileged claim : See *McMaster v. King*, 3 App. R. 106.

I think that the appeal should be allowed, and that judgment should be entered for the defendants on the demurrer.

BURTON and MORRISON, J J. A., concurred.

Appeal allowed.

BLAND V. EATON.

Statute of Frauds—Memorandum—Sufficiency of—Contract to procure lease.

The defendant agreed to pay the plaintiff \$300 if he would procure a lease of the premises then occupied by him under lease from one W., and adjoining the defendant's, with the privilege of making a doorway between the two houses, and assign the lease to him. At the plaintiff's request, the defendant wrote him the following letter:

"To Mr. JOHN BLAND.

"DEAR SIR,—In reply to yours of to-day, I promise to give you \$300 provided you can give me a transfer lease, with privilege to make an opening between your premises and my own.

Cash to be paid on completion of transfer lease. This is as I understand it.

"Yours most truly,

"T. EATON."

The plaintiff procured a lease, and tendered an assignment of it to the defendant, who refused to accept it, whereupon the plaintiff sued for the \$300.

Held, reversing the decision of the County Court, that the defendant's letter was a sufficient memorandum to satisfy the requirements of the 4th section of the Statute of Frauds, within which the agreement fell as being a contract concerning an interest in land: that the premises were described with sufficient certainty, and the omission to specify the terms of the lease was immaterial, they having been left in the plaintiff's discretion. The plaintiff, therefore, was held entitled to recover.

Appeal from the County Court of York.

The defendant carried on the business of dealer in dry goods, millinery, &c., in premises in Toronto, and the plaintiff occupied the adjoining premises as tenant to a Mr. Wanless.

The plaintiff's lease expired on the 1st of March, 1878, or a day earlier, and the defendant wished to add those premises to his own as an extension of his shop.

There were reasons why the defendant could not negotiate directly with Mr. Wanless, and he therefore offered the plaintiff \$300 if he would procure a lease from Mr. Wanless, with leave to assign it to the defendant, and with leave for the defendant to break a doorway through from the one shop to the other, and would assign that lease to the defendant.

In answer to a letter which the plaintiff wrote him

asking him to put his offer in writing, the defendant sent him the following reply :

" March 9th, 1880.

" To MR. JOHN BLAND, City,

" DEAR SIR,—In reply to yours of to-day I propose to give you \$300 (three hundred dollars), provided you can give me a transfer lease, with privilege to make an opening between your premises and my own.

" Cash to be paid on completion of transfer lease. This is as I understand it.

" Yours most truly,

" T. EATON."

There did not appear to have been any definite stipulation as to the term or the rent, the defendant leaving it to the plaintiff to make the best bargain he could. The plaintiff said in his evidence: "I was to procure the lease for the longest term I could. He first stated ten years. I told him I did not think I could get it for that time. He said to make the best terms I could. I procured it for five years. I was just to do the best I could about the rent. I got it at a little less than I had been paying." All that was noted as having been said on the subject by the defendant is the following: "In conversation he told me he could get the place for \$100 a month. The lease was to be for five years. I never got an agreement made with him about the hole in the wall. I simply told him what I wanted, that is, to join two into one." And then the following dialogue occurred in his cross-examination :

" Q. What did you offer him \$300 for ?

" A. It was to get possession of his store at the expiration of his lease. I was to take it off his hands as soon as he could get out.

" Q. Supposing he would get out the next day after you were talking to him, were you to give him \$300 then ?

" A. Yes, for getting me the lease for five years for \$1,200 or whatever rent he could get it for. He said he thought he could get it for less, and I told him to do the best he could. He promised to do a certain thing: he had

possession of this house; if I would give him \$300 he would get me a lease for it.

"Q. You say that you were to give him \$300 for giving you possession of the place when his lease was through?

"A. No, that is not it. There was no definite time; whether it would be in January or February, or the 1st of March, I was to take it from him as soon as he got the other house, and he was to give it to me. His lease was up the end of February. If he could not get it before he was to give it to me when his lease was out; that was the understanding. He was either to give it to me before his lease expired, or to give it after his lease expired, and get me a lease from Mr. Wanless."

The plaintiff succeeded, after using such influence as he could command, including the intercession of several of his friends, in procuring the lease from Mr. Wanless. It was executed sometime in April, and on the 22nd of April the plaintiff tendered an assignment of it to the defendant, which the defendant refused to accept.

The lease, although not executed, and indeed not agreed to be given, until April, was dated the 1st day of March, and was for a term of five years, beginning on that day.

This action was brought to recover the agreed \$300.

The case was tried before the Judge of the County Court of York, when a verdict was rendered for the plaintiff. Afterwards the learned Judge made absolute a rule *nisi* to set aside a verdict for the plaintiff, and to enter a nonsuit, on the ground that the agreement was within the Statute of Frauds, and that there was no sufficient memorandum to satisfy the statute.

The plaintiff appealed.

The case was argued on the 28th January, 1881.

Bigelow, for the appellant. The learned Judge was wrong in holding that the agreement in question must be in writing, as it was not one respecting an interest in lands. The appellant was merely acting as the respondent's agent.

(a) *Present*.—BURTON, PATTERSON, and MORRISON, JJ. A.

in procuring the lease, and is clearly entitled to recover : *White v. Curry*, 39 U. C. R. 569 ; *Agnew* on Statute of Frauds, 287. At all events the appellant is entitled to recover upon the common counts some remuneration for his services, and the jury having given the amount agreed upon, their verdict should not be disturbed : *Simpson v. Lamb*, 17 C. B. 617. Even if the contract was within the Statute of Frauds, our contention is that the letter of the 9th March was a sufficient note or memorandum in writing, to satisfy the statute.

Rose, for the respondent. The agreement was a dealing with an interest in lands, and must be evidenced in writing : *Cocking v. Ward*, 1 C. B. 865 ; *Seago v. Deane*, 4 Bing. 459 ; *Teal v. Auly*, 2 B. & B. 99 ; *Savage v. Canning*, 1 Ir. L. R. 434 ; *Smith v. Tombs*, 3. Jur. 72 ; *Foquet v. Moor*, 7 Ex. 870 ; *Gross v. Bricker*, 18 U. C. R. 410 ; *Johnstone v. Cowan*, 25 U. C. R. 470 ; *Horsey v. Graham*, L. R. 5 C. P. 9 ; *Hope v. Dixon*, 22 Gr. 443 ; *Kelly v. Sweeten*, 14 Gr. 376 ; *Nesham v. Selby*, L. R. 13 Eq. 191. *Hodgson v. Johnson*. E. B. & E. 685, is on all fours with the case in hand. The appellant cannot succeed on the common counts, as \$300 is beyond the jurisdiction of the County Court. The letter of March 9th is not sufficient to answer the requirement of the statute, as the premises are not defined with any certainty. Even if there was a valid contract, there was no performance of it, as the evidence shews that the lease was not such as the appellant agreed to procure.

Bigelow, in reply. The County Court has jurisdiction up to \$400 where the amount is ascertained by the act of parties ; and the amount here was fixed at \$300. All the authorities cited by the respondent are distinguishable, as in those cases there was an interest in land transferred, which was not the case here.

March 1, 1881. PATTERSON, J. A.—As the case comes before us on this appeal, I understand it is free from some disputes on matters of fact which were the subject of a good deal of the evidence at the trial ; and that although

the report of the charge of the learned Judge, and of the finding of the jury, may not afford precise information as to how these questions were disposed of, they have been got rid of some how, and the contest has been reduced to one respecting the legal effect of what was done.

In the absence of a definite finding by the jury I suppose we should assume the fact to be that the plaintiff was to make the best terms he could, with the understanding that the lease was to be for at least five years.

The great contest would seem to have been on the question whether the defendant was to accept the transfer of the lease unless it was ready for him before a certain date. The defendant seems to put the 19th of March as the latest date, and he asserted that after that date he forbade the plaintiff proceeding farther with the negotiations. The plaintiff denied that any such limit was fixed; and his view was sustained, as I think we must understand, although even that is not very distinctly shewn. It was certainly supported by tolerably direct evidence.

The judgment of the County Court was, that the agreement was within the Statute of Frauds, and that there was no sufficient memorandum to satisfy the statute. The latter point seems rather to have been assumed, as the judgment is occupied entirely with the discussion of the former. The decision was given upon a motion for nonsuit, upon leave reserved at the trial. The case was left to the jury, and although the report does not shew precisely what was found, we must, upon this appeal, take it that the facts were found in favour of the plaintiff, who had a verdict for \$300.

There are three questions for our decision :

1. Is the agreement within the fourth section of the Statute of Frauds as an "agreement made upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them?"
2. Is there a sufficient memorandum or note thereof in writing signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized?"

3. Was the lease which the plaintiff procured one which satisfied his contract?

The first question must, in my opinion, be answered in accordance with the decision of the learned Judge in the Court below.

Against this conclusion the circumstance that the plaintiff was acting only on behalf of the defendant, and, as it were, as his agent, was relied on by Mr. Bigelow for the plaintiff, and *White v. Curry*, 39 U. C. R. 569, was cited as authority in his favour. The question of the statute was decided in that case upon the ground that the plaintiff was suing for commission on the purchase of land by the defendant, and that the plaintiff did not sue the defendant on a contract for the sale of land, but for services performed for the defendant at his request; which contract was held to be one entirely collateral to the contract for the sale of the land. The defendant there had agreed with the plaintiff to give him \$1,000 if he procured a property for him for a certain price, and the defendant having procured a conveyance to the plaintiff for the stipulated price, sued for the \$1,000.

That statement may perhaps distinguish the case from *Horsev v. Graham*, L. R. 5 C. P. 9, which was also an action upon an agreement between an agent or land broker, who had no interest in the property, and an intending purchaser; but the broker had undertaken to procure the property for his employer for a named sum, and the action was against the broker for failing to perform his agreement. There was, in that case, a written agreement, sufficient to satisfy the statute. It may be worth while to note, in passing, as the case is often quoted, that the material parts of the contract are not all to be found in the head note, or in the extract given in the judgment of Harrison, C. J., in *Jackson v. Yeomans*, 39 U. C. R. 288. That written agreement, however, had been varied by an interlineation; and in considering whether the case should be sent back to a new trial, in order to ascertain when the interlineation was made, it became necessary to decide whether a writing was or

was not necessary. Bovill, C.J., Brett and Byles, JJ., held decidedly that the case came within the statute, and Keating, J., though hesitating, did not dissent. He said, at p. 14, "My doubt arises on the words of the statute: 'any contract or sale of any interest in, or concerning land.' No case has been adduced in which the party to the contract did not part with some interest in the land; but I do not feel strongly enough on the subject to lead me to dissent."

In the case before us the learned Judge supplies, in his judgment, a fact which one would have expected to find noted in the report of the trial, viz., that the plaintiff failed on his first count, which alleged an agreement to obtain a lease for the defendant, and proved only his second count, which was upon the defendant's promise to pay \$300 if the plaintiff would *procure* a lease and *transfer* it to the defendant. The defendant was therefore to receive an interest in land from the plaintiff as the consideration for the \$300. That was the form of the agreement, and that was the shape taken by the plaintiff's part performance. The objection to the completion came from the defendant. If it had happened to come from the plaintiff, if having got the lease he had conceived the idea of keeping the premises himself, I do not see how, without a written agreement, the defendant could have compelled him to assign the lease. The law is thus stated in *Lewin on Trusts*. I quote from p. 129, of the 4th ed.: "The rule as at present established will not warrant the admission of parol evidence where an estate is purchased by an *agent*, and no part of the consideration is paid by the employer; for though an agent is a trustee in equity, yet the trust is one arising *ex-contractu*, and not resulting by operation of law. The agent may be indicted for perjury in denying his character, and may be convicted, yet the Court has no power to decree the trust."

On the second question I am not so free from doubt.

The plaintiff wished to have something in writing to bind the defendant, and the latter accordingly wrote this letter:

" March 9th, 1880.

" TO MR. JOHN BLAND, City.

" DEAR SIR,—In reply to yours of to-day, I propose to give you \$300 (three hundred dollars), provided you can give me a transfer lease, with privilege to make an opening between your premises and my own.

" Cash to be paid on completion of transfer lease. This is as I understand it.

" Yours, most truly,

" T. EATON."

The letter to which this was a reply has not been produced, and all we know of it is contained in the words, which form part of the plaintiff's evidence, "It was soon after that I wrote that note to Mr. Eaton, asking him to put his offer in writing." Whether or not the production of the letter would have made the memorandum more definite is a matter on which we cannot even venture a surmise.

It is objected that the letter of the 9th of March does not state the premises with sufficient certainty, nor the terms of the lease; and in support of these objections, Mr. Rose has referred us to several decisions.

There can be no question that, under the rule as well settled, the memorandum must shew what is the subject matter of the contract, as well as the terms of the contract, and who are the contracting parties. But these particulars need not be expressly stated *totidem verbis*. They may be deduced by reasonable inference, if the language permits it. I may refer on this point to some of the more recent decisions.

Thus in *Commings et al. v. Scott*, L. R. 20 Eq. 11, the vendors were simply described as "the vendors" in the memorandum signed by Edward Commings, their solicitor. Sir G. Jessel, M. R., held that sufficient, and in doing so used language which may be usefully quoted. He said: "In order that there may be a contract, at least two things are necessary, namely, contracting parties and subject matter of a contract. No doubt other things are necessary, such as proper words of contract; but, at all events, those

two things there must be. No doubt arises in this case as to the subject matter of the contract: the only question is whether the written memorandum of agreement contains a sufficient description of the parties to the contract. Now the Court ought to be careful not to manufacture descriptions, or to be astute to discover descriptions which a jury could not identify; for, as I understand it, at law that would be a question for the jury. Upon this memorandum it appears, in the first place, that the vendors employed Edward Commins as their agent, and that he was their solicitor; but the conditions shew a great deal more than that. They shew that the vendors are in possession. That, I think, is the fair inference from the fifth condition. They also shew that what is to be sold are the interests of a company in property on which the company has been carrying on operations. * * In my opinion, the only fair inference from these conditions is, that the vendors are a company in possession of the property, who have been carrying on operations there; it is admitted that the plaintiffs are such a company; and I am of opinion, therefore, that there is a good contract."

In *Catling v. King*, L. R. 5 Chy. D. 660, the words were, "The vendor is a trustee selling under a trust for sale, and the concurrence of the persons beneficially interested shall not be required." Hall, V.C., considered this insufficient under the statute, but the Court of Appeal, consisting of Jessel, M. R., James and Mellish, L.JJ., and Bagallay, J.A., held unanimously a different opinion, considering that, as a trustee of land must be a trustee under some instrument, his name would be found there, and that the description was really more certain than a proper name would be. James, L.J., said, at p. 664, "The only difficulty which struck me at the moment was mentioned by Mr. Russell Roberts, who suggested that there might be two trustees in this case of the same property under different instruments. That is an ambiguity which would have to be dealt with, but it is no more than might occur in any case, for you could almost always shew two persons of the same name and two properties of the same name."

Then we have the united authority of the Master of the Rolls, the Court of Appeal, and the House of Lords, holding in the case of *Rossiter v. Miller*, L. R. 3 App. Cas. 1124, the word "proprietors" a sufficient description. Lord Cairns thus states the principle, at p. 1140: "In point of fact the question is, is there that certainty which is described in the legal maxim *id certum est quod certum reddi potest*." And Lord Blackburn, at p. 1153: "Though the construction by which it is held that there can be no memorandum of the agreement, unless the writing shews who the parties are, is now inveterate, it is not necessary that they should be named. It is enough if the parties are sufficiently described to fix who they are without receiving any evidence of that character which Sir James Wigram, in his Treatise, calls evidence 'to prove intention as an independent fact.'"

The rule thus acted upon in discovering from the writing who the contracting parties are is equally applicable to ascertaining the subject matter of the contract.

I think the subject matter of this contract can be discovered without manufacturing a description or being unreasonably astute. The defendant is to have a "transfer lease," an expression which has the merit of originality, and shews that the bargain is for the assignment of a lease. Then from the demand of the "privilege to make an opening between your premises and my own," we learn that the defendant was looking for an interest in the plaintiff's premises, to which the opening was to give him access; and we are thus pointed to those premises as being the subject of the negotiation, and, of course, of the lease. We learn, moreover, that the plaintiff's premises adjoined those of the defendant, although that is not a material circumstance. The letter is equivalent to an offer for "a transfer lease of your premises, with privilege to make an opening from them into mine." Reading it in this way, we are, I think, within the *ratio decidendi* of the cases to which I have alluded, and within the principle of others which may be found, in treating that as a sufficient description to

satisfy the statutory requirement of a note or memorandum of the contract. The object of the statute is effectually served by it, as any other interpretation, though enforced by ingenious perjury, would be too far-fetched to receive credence.

In *Ogilvie v. Foljambe*, 3 Mer. 53, the agreement, shewn by letters, was to give £14,000 for Mr. Ogilvie's house ; and that was held to be a good contract, because parol evidence was admissible to shew what house of Mr. Ogilvie's was the subject of the contract.

In *Owen v. Thomas*, 3 M. & K. 353, a person having sold a house at Chipstow, wrote to his solicitor, "I have sold my house to Mr. Thomas for so much money, the deeds are in your hands." This was held by Sir J. Leach to be sufficient, as it could be ascertained by inquiry before the Master what property the deeds referred to.

In *McMurray v. Spicer*, L. R. 5 Eq. 527, the description was "the mill property, including cottages in Esher village, all property in Esher parish to be freehold." It was argued that this was not a sufficient description of the property in question, some of which was at a distance from the mill, and some not even in the parish of Esher, but in the adjoining parish of Walton. But Malins, V. C., held upon the evidence that the property had acquired the reputation of being the mill property of McMurray, in the parish of Esher, and was well described in the contract by those terms.

There has been no difficulty in proving by parol where the leasehold premises of the plaintiff are, and it has been shewn that they adjoined those of the defendant.

There remains, however, the objection that the terms of the lease are not specified ; and there are, no doubt, instances enough in which, for some purposes, an objection of that kind has been formidable. One of these, viz., *Nesham v. Selby*, L. R. 13 Eq. 191, was cited by Mr. Rose. A letter there stated an agreement to take a lease for seven years, but omitted to state from what date. This was conceded to be insufficient, and the contest turned upon the effect

of further correspondence. The suit was for specific performance, and the contract to be proved, and to be proved in conformity with the statute, was necessarily one sufficiently definite in its terms to be specifically enforced. The defect was, as it strikes me, not that the letter did not contain all the essentials of a bargain, but that it was too loose and indefinite, and therefore not *the* bargain which was set up in that suit. People may make loose bargains, and they often get into trouble by doing so. They may be exposed to an action for damages upon a contract which equity would not specifically enforce. What the statute requires is not that a prudent and well considered agreement shall be made, but that whatever the agreement is it shall be noted in writing, or no action shall be brought upon it.

In this case, if the defendant agreed to take from the plaintiff whatever lease the plaintiff should be able to procure from Wanless, so long as it secured the right of making the doorway, and to pay him \$300 for it, he might discover too late, in case the lease proved less favourable, either in duration of term or amount of rent, than he expected, that he had made a careless bargain; but that would be no reason for holding the writing which stated the agreement to be insufficient to satisfy the statute. I cannot say that the bargain in this case was more specific than the defendant's own letter imports. It is only by going outside the writing that we receive a suggestion that a more specific proposal had been made. The defendant says the term was to be for five years: the plaintiff puts the matter, in this respect, about as vaguely as the writing; and although he did get a lease for five years, and so came up to the defendant's expectations, it does not follow that the agreement would not have been satisfied by a shorter term. Both parties seem to agree that the rent and all other terms of the lease were left at large.

This question of the sufficiency of the writing does not appear, from the learned Judge's note of the proceedings and of his judgment, to have been raised before him. Had

it been pressed, he might probably have taken the same view which seems to me on the whole to be the proper one, viz., that there is a note or memorandum of the contract, signed by the defendant, contained in the letter of the 9th of March, and that the letter thus fulfils the purpose for which it was written.

Then there is the third question, viz., performance on the part of the plaintiff.

The principal objection, and indeed the only one that strikes me as having anything in it, is to the offer, late in April, of a lease dating from the 1st of March.

I do not trace any of the objections to the lease in the note of proceedings below. That is not in itself a matter of much consequence, beyond the loss to us of the advantage of knowing how they would have struck the learned Judge, because, of course, they could not have been cured by any amendment; but if they had been made the reason for refusing to accept the transfer when it was tendered, there would have been an opportunity for the plaintiff to have attempted to remedy whatever he might have been advised was wrong. Coming at this stage of the matter, they must, of course, be dealt with fairly on their merits, but the Court cannot be expected to look indulgently at them.

There is a discrepancy between different statements in the evidence as to when the plaintiff's term ended. He himself speaks of it in one place, if he is correctly reported, as ending at the *last* of March, saying he had supposed it ended at the last of February. The defendant fixes the last mentioned date, and from the circumstance that the new lease was made to run from the 1st of March, I suppose the defendant is right. The old lease is not produced, and Mr. Wanless, who was a witness at the trial, was not asked anything about it.

The question of performance, or rather of the contract, would, apart from the statute, have been properly one for the jury, and as I have already remarked, we must take the jury to have found all the facts for the plaintiff.

Looking at the whole matter upon the evidence, I cannot say that a finding for the plaintiff upon this question would have been wrong. The arrangement of terms and the amount of rent were left to the plaintiff to settle as best he could, and in this particular the written evidence is consistent with what the plaintiff says. If he could only get the five years' lease by making it run from the termination of his former term, so that the defendant's enjoyment of the premises would be a month or more short of five years, while he paid full five years' rent, it was after all only the question of the term and the rent, and so within the range of the plaintiff's authority to settle. In the absence of explanation, it is impossible to say that the defendant could reject the lease on this ground.

The same observations apply to the other terms of the lease.

I think justice will be done by our allowing the appeal, with costs, and directing that the rule in the Court below be discharged.

BURTON and MORRISON, JJ.A., concurred.

Appeal allowed.

WILSON V. BROWN ET AL.

Promissory note—Principal and surety inter se—Notice of non-payment.

The defendants made a joint and several promissory note with one H., as sureties for him, payable to the plaintiff.

Held, affirming the judgment of the County Court, that in default of payment at maturity their liability to pay became absolute; and that it was no defence for them, that the plaintiff neglected to present the note for payment, or give notice of non-payment by H., of which they were ignorant, and that believing the note had been paid by H., they took no steps to recover from him, although he was able to pay, and before they became aware of such non-payment H. had become insolvent.

APPEAL from the County Court of Oxford.

Declaration on a promissory note for \$300, made by the defendants, payable twelve months after date to the plaintiff.

Plea on equitable grounds, by the defendant Thomas Wells, that he and Peter Johnson Brown, his co-defendant, made the said promissory note jointly with one Charles P. Hall, to secure a debt due to the plaintiff by the said Charles P. Hall, and save as aforesaid there never was any value or consideration for either of the defendants making the said note, and the said note was delivered to and accepted by him from the defendants, Thomas Wells and Peter Johnson Brown, as surety only for the said Charles P. Hall, and the plaintiff then had notice and knowledge of the same having been so made by the defendants as such sureties. That the said Charles P. Hall promised that he would pay the said note at maturity, as the plaintiff, who was the holder of the same when it became due, well knew. Yet the plaintiff, being such holder, neglected to present the said note for payment either to the said Charles P. Hall or to the defendants, or either of them, or to give notice of such non-payment (of which non-payment the defendants were each of them ignorant), to the defendants, or either of them; whereby the defendants were led to believe, and did believe that the said note was paid by the said Charles P. Hall, and that they were discharged therefrom; and the defendants, relying on such belief so induced by the plaintiff, took no steps to recover the amount of the said note from

the said Charles P. Hall, although he was of sufficient means and ability to pay the same. And the said Thomas P. Wells further says, that before the said defendants or either of them became aware of the non-payment of the said note, the said Charles P. Hall became insolvent, and wholly unable to pay the same, or any part of the same, and had notice been given within a reasonable time to the defendants of such non-payment they could have compelled payment from the said Charles P. Hall. And so the said Thomas Wells says, that by reason of the said neglect of the plaintiff to present the said note for payment, and to give such notice of non-payment, he, the said Thomas Wells, is discharged.

The defendant Peter Johnson Brown pleaded a similar plea.

Demurrer : that there is no duty or rule which required the plaintiff to present the said note for payment, either to the said Charles P. Hall or to the defendants, or either of them, or to give notice of such non-payment, and the neglect to present such note or give such notice is no ground of defence. That the defendants contract was to pay the said promissory note absolutely, and not as endorsers of the note, which was duly presented and dishonoured, they themselves having notice thereof.

The learned Judge of the County Court gave judgment in favour of the plaintiff.

The defendants appealed.

The appeal was argued 27th January, 1881.

C. Robinson, Q. C., for the appellants, cited *Palmer v. Baker*, 23 C. P. 311 ; *Brandt on Suretyship*, sec. 172 ; *Bigelow on Bills and Notes*, 139-140, 2nd Ed. ; *Chalmers's Digest of Bills and Notes*, art. 204, 172, 173, 194 ; *Byles on Bills*, 11th ed., 292 ; *Smith v. Mercer*, L. R. 3 Ex. 51 ; *Holbrow v. Wilkins*, 1 B. & C. 10 ; *Philips v. Astling*, 2 Taunt. 206 ; *Story on Promissory Notes*, sec. 460, 7th ed.

Ferguson, Q.C., for the respondent.

March 1, 1881. BURTON, J.A.—If the contention of the defendants upon this demurrer be held entitled to prevail, the position of the holder of a joint and several note with notice that one of the makers *inter se* is surety for the other, will be less favourable than that of the holder of a note made by the principal debtor, and endorsed by the surety; for, I apprehend no cases can be found in which the endorser whose liability has become absolute has been held relieved by any mere forbearance or laches of the creditor, or the omission subsequently to inform him that the note still remains unpaid. I have always understood the rule to be that the creditor may leave the duty of procuring the fulfilment of the contract where the words of the contract place it, without fear that his inaction will debar him from the subsequent assertion of his rights, or discharge the debtor from the obligation into which he has entered. If that be true with reference to the endorser of a note, the rule would seem to apply with greater force where on the face of the instrument the party occupies the position of a principal debtor, and so is primarily liable to the payee.

In *Wright v. Simpson*, 6 Ves. 714, Lord Eldon said, at p. 733: "The surety is a guarantee, and it is his business to see whether the principal pays, and not that of the creditor.

To the same effect is *Eyre v. Everett*, 2 Russ. 281. "The surety," says the same learned Judge, "must himself use diligence and take such effectual means as will enable him to call on the creditors either to sue or give him, the surety, the means of suing."

No doubt even at law, since the introduction of equitable defences, whatever may be the form of the instrument, if the creditor becomes aware at any time that one of the parties who has contracted with him as a principal is really but a surety, he cannot disregard his right as such surety.

In the present case the defendants in the plea demurred to set up that they made the note declared on jointly with one Hall, and simply as sureties for him, and that the

plaintiff, with knowledge of that fact, neglected to present the note for payment, or to give them notice of non-payment, whereby the defendants were led to believe that it was paid, and in reliance on that belief so induced took no steps to recover the amount from Hall, although for some time after the maturity of the note he was well able to pay, and that before they became aware of the non-payment Hall became insolvent and unable to pay the note or any part of it.

It cannot for a moment be doubted that if with such knowledge the creditor had taken any steps to the prejudice of the surety, such for instance as entering into a binding agreement to give time to Hall, these defendants would have been discharged, but I have been unable to find any authority binding upon us that the creditor is bound to protect the surety. The utmost extent to which the authorities have gone is, that the creditor is bound to do nothing to prevent the surety from protecting himself, and if he has other securities in his hands to which the surety on payment would be entitled, to do whatever may be necessary to make that security properly available. The right of the surety to be subrogated to all the means at the disposal of the creditor is, as it has been said, one of the highest equity, and any act by which it is curtailed will to the extent of the injury inflicted be a defence.

Wulff v. Jay, L. R. 7 Q. B. 761, is a case of that nature. There the surety became so upon the faith of there being some real and substantial security pledged as well as his own credit to the plaintiffs, and he was entitled therefore to the benefit of that substantial security in the event of his being called upon to fulfil his duty as surety. If the creditor therefore put it out of his power, *by the omission of some duty incumbent upon him*, to hand over to the surety the means of recouping himself, to that extent the would be discharged.

The cases cited referred to in the text books that were quoted will be found, on examination, to have no applica-

tion to the case before us. They are cases of guarantee by a separate instrument. Even in these cases no notice is necessary unless the terms of the guarantee or the nature and circumstances of the particular case require it. When the subject of the guarantee is the payment of a certain sum at a certain time, whatever is sufficient to show default in the original debtor will ordinarily shew a breach of the contract of guaranty, and a right of action upon it, and the creditor is not bound to use diligence or to give notice of non-payment.

The case of *Phillips v. Astley*, 2 Taunt. 206, cited by Mr. Robinson, would at first sight appear to be opposed to this view, but when examined it will be found that that was not the guarantee of a bill or ascertained debt then existing, but for the price of goods to be thereafter delivered, not exceeding £500, and to be paid for by bill.

In that case also the goods were furnished to the persons who were the drawers of the bill, and as to whom presentment and notice of non-payment were necessary.

So when the guaranty is that a debt is good or collectable, the creditor himself assumes a duty, viz., to use due diligence to enforce payment, and to give reasonable notice of non-payment.

This distinction appears to have been recognized in *Walton v. Mascall*, 13 M. & W. 452, and is in accordance with the long established rule of the common law. Thus in *Brookbank v. Taylor*, Croke Jac. 685, the promise was collateral, that if the tenant did not pay the rent the defendant would pay it for him. The Court said that the plaintiff was under no obligation to give notice of the default of the tenant, because the defendant was bound to take notice of it at his peril.

The distinction would seem to be this, that a demand and notice of default is not a condition precedent to the liability of a person who has given a guarantee for payment of a bill or note by the maker or acceptor, although it may be otherwise where he guarantees the payment by the drawer, and is required in cases where the liability is

dependent upon a contingency exclusively within the knowledge of the creditor.

But whenever in either case the liability of the guarantee has become absolute, no further notice is requisite.

This is, however, a very different case to those I have referred to. The defendants are parties to the note itself as makers, and have come under a direct primary liability to pay it according to its tenor and effect. It can be no excuse for them to say that they have received no notice that their own note is not paid, and it is no defence to a person in the position of surety, whose liability is or has become absolute, that the creditor should continue to keep him advised that the debt still remains unpaid.

I think the judgment of the Court below is correct, and should be affirmed, and this appeal dismissed, with costs.

PATTERSON and MORRISON, JJ.A., concurred.

Appeal dismissed.

CARROLL V. FITZGERALD.

Married woman—Separate estate—Acquiescence of husband—Wife's earnings—C. S. U. C. c. 73.

The plaintiff, a widow, had, during her coverture, lent the defendant a sum of money which she had earned when living apart from her husband, who had never made any claim to this money, or to any of her earnings.

Held, affirming the judgment of the County Court, that the plaintiff was entitled to recover, as the evidence showed that the husband had acquiesced in her treating her earnings as her separate property; and that C. S. U. c. 73, which was in force when the money was lent, in no way abridged the power of the husband to make such a settlement by his acts or acquiescence as well as by a formal writing or distinct words.

APPEAL from the County Court of York.

This was an action on the common counts to recover \$100 from the defendant which the plaintiff had lent him in 1863. The defendant pleaded never indebted, and sought to prove at the trial which took place before Mackenzie, County Judge, and a jury, that the plaintiff had given him the \$100. The jury, however, rendered a verdict in favour of the plaintiff.

The facts are stated in the judgment.

A rule *nisi* to set the verdict aside and to enter a non-suit, on the ground that the money in question belonged to the plaintiff's husband, who was then and for a long time afterwards living, was subsequently discharged.

The defendant appealed.

The case was argued on the 26th January, 1881 (a).

Eddis, for the appellant. We were entitled to a non-suit in this case, as the evidence shewed that the money which is the subject matter of this action, was earned by the respondent during her husband's life time, and it therefore belonged to him. The respondent had clearly no cause of action in her own right in respect of the money, and upon her husband's death the cause of action survived to his representatives. The authorities shew that

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a husband is entitled to the earnings of his wife even when she is living apart from him, *Glover v. Proprietors of Drury Lane*, 2 Chitty, 117; *Rischmuller v. Uberhaust*, 11 U. C. R. 425; *Bird v. Peagram*, 13 C. B. 639; *King v. Basingham*, 8 Mod. 199; *Lloyd v. Pughe*, L. R. 8 Ch. App. 90. It is moreover expressly declared by sec. 5 of C. S. U. C., ch. 73, which was in force when the money was lent, that a married woman shall not be entitled to her earnings without having first obtained an order under the Act for her protection. The respondent could not lend money during her husband's life except as his agent, and no *chose in action* is created in her favour by her doing so.

McMichael, Q.C., for the respondent. The law is well settled, that where a husband permits his wife to carry on a business for her separate use and benefit, it becomes her separate property. It was shewn here beyond all controversy that the husband had acquiesced in his wife treating the money which she earned as her own, and such being the case her right to maintain this action cannot be denied. The statute referred to by the appellant does not affect this right, as it does not prevent a husband from giving his wife permission to use her earnings for own her use; it was merely intended to preclude the wife from treating her earnings as her own without her husband's permission, unless she had obtained an order for her protection. He cited *Roper on Husband and Wife*, 171, 2nd ed; *Cecil v. Juxon*, 1 Atk. 278; *Gore v. Knight*, 2 Vern. 535; *Lamphir v. Creed*, 8 Ver. 599; *Messenger v. Clarke*, 5 Ex. 338; *Slanning v. Styles*, 3 P. Wms. 337. *Ashworth v. Outram*, L. R. 5 Ch. D. 923.

March 1, 1881. PATTERSON, J.A.—This action is brought by Mrs. Carroll to recover \$100 which she alleges she lent, in 1863, to the defendant, who is her son-in-law.

The defendant does not deny the receipt of the money, but he says it was a gift, and not a loan.

This issue was decided against the defendant, who then fell back upon an objection to the plaintiff's right of

action ; and the question of law having also been decided adversely to him in the County Court, he has brought this appeal.

The facts which give occasion to the controversy form a chapter in the history of a struggle with the world, not very unusual in its character ; and I think but little is required, beyond a short statement of them, to shew that the judgment of the learned Judge of the County Court is in accordance alike with justice and with law.

The plaintiff was the widow of one O'Gorman, and married Carroll, from whom she soon separated, coming to Toronto with her children, who were all of the first marriage, and leaving her husband in Ireland. In Toronto she managed, by her earnings in domestic service and from keeping cows and otherwise, to support herself and her children, and to lay by the money which she lent to the defendant after he married her daughter. She had been ten or eleven years separated from her husband at the time she lent the money. He had followed her to Canada, some three years after she came, and he lived also in Toronto ; but they continued separate, and he never interfered with her. That was the state of affairs in 1863 ; and until the death of Carroll, which occurred in Toronto in 1877, he had never made any claim to this money or to her earnings in any shape, or in any way meddled with her affairs. This action was commenced in November, 1878.

The defendant's contention is that the money was the husband's, and that the right of action for it is in his personal representative, and not in the plaintiff.

The question was raised by motion for a nonsuit, upon the ground that the evidence shewed the money to belong to the husband and not to the wife ; and leave was reserved to move to enter a nonsuit, the only question left to the jury being whether the money was a loan or a gift. It was not suggested in the Court below or before us that the question whether or not the husband acquiesced in the separate dealing of the wife should have been decided by

the jury, rather than by the Court. Indeed it would have been a mere matter of form to have treated it as a circumstance in dispute, as no evidence of acquiescence could possibly have been more conclusive.

The law upon the subject, irrespective of the Acts respecting the property of married women, is very plain ; and is too well settled to require any detailed reference to decisions. I cannot state it more clearly than by quoting from *Roper* on Husband and Wife, 2nd ed., where, in vol. ii. at p. 165, there is this passage: "Independently of the acquirement by the wife of separate property by the means before mentioned, she may do so by carrying on a trade on her own separate account, apart from and without the interference of her husband. * * Her ability to carry on such business on her own individual account

* * does not arise from any particular custom, but in consequence of the express agreement between her and her husband *before* marriage, or from his *subsequent* permission. When the agreement is made *previously* to the marriage, since the consideration is valuable, the transaction will not only be obligatory on the husband, but also binding upon his creditors. When the agreement originates *during* the marriage it will be void against his creditors, but good against himself for the reasons mentioned in a preceding chapter of this work [vol. i. p. 288 *et seq.*] which treats of the validity of settlements made before and after marriage." And at p. 171: "If therefore the husband *merely agree*, in articles before the marriage, that his wife shall carry on business on her own sole account ; or, without any such agreement, if he *permit* her to do so afterwards, all that she earns in the trade will in equity be her separate property, and be applicable and disposable by her as such, subject to the demands affecting it. So also it will be if the husband desert her, and she by the aid of her friends carry on a separate trade for her support."

This law is stated and acted upon in the recent case of *Ashworth v. Outram*, L. R. 5 Chy. D. 923.

It is scarcely necessary to remark that nothing turns on

the question whether the plaintiff's right is legal or equitable, as under our present system an equitable right will support the action as well as a legal one.

On the part of the defendant, however, Mr. Eddis refers to our statute of 1859, 22 Vic. ch. 34. which, as re-enacted in Consol. Stat. U. C. ch. 73, was in force when the money was lent in 1863, and perhaps when part or all of it was earned; and he argues that the earnings of the plaintiff must be treated as having always belonged to her husband, under the effect of section 5, which declared that "no married woman shall be entitled to her earnings during coverture without an order of protection under the provisions hereinafter contained."

The effect of depriving the married woman of rights which she already enjoyed, thus attributed to an Act, the preamble of which declared that the law of Upper Canada relating to the property of married women was frequently productive of great injustice, and that it was highly desirable that amendments should be made therein for the better protection of their rights, could not be conceded unless the language left no room for escape from such a result. A little consideration of the Act makes it plain not only that no such intention can fairly be deduced from what is said, but that we should do violence to the language in which the enactments are framed if we adopted the reading contended for. Sections 1 and 2 lay down the general rule which is to govern, giving to the wife the right to enjoy her property free from the debts and obligations of her husband and from his control or disposition without her consent in as full and ample a manner as if she were *sole* and unmarried. Then sections 3, 4, and 5 are introduced, each beginning with "Provided," as exceptions from or restrictions upon this general rule: section 3 leaving the separate property liable to seizure and sale under execution against the husband for the torts of the wife: section 4 preventing the wife, by any act, depriving her husband of curtesy in her hands: and section 5 continuing the husband's right to the wife's earnings unless.

she has an order for protection. It gives the husband no right which he did not before possess, as neither does section 3 or section 4; it merely leaves his right unaffected. It operates only, as between husband and wife, to disable her from insisting, by reason of the general provision in her favour, as against her husband, that her earnings are hers and not his; but it in no way limits his power to settle upon her for her separate use her earnings during coverture, or any other property which at common law he was competent to settle; nor does it abridge his power to make or evidence such a settlement by his acts or acquiescence, as well as by a formal writing or by distinct words.

We must dismiss the appeal, with costs.

BURTON and MORRISON, JJ.A., concurred.

Appeal dismissed.

FISKEN V. O'NEILL.

Insolvent Act of 1875—Sale of debts over \$100.

Held, affirming the judgment of the County Court, that under section 67 of the Insolvent Act of 1875, all debts exceeding \$100, must be sold separately, unless where there is a sale of the whole estate *en bloc*; and the purchaser of such a debt, otherwise than the section directs, cannot recover against the debtor.

APPEAL from the County Court of the county of York.

This was an action brought by the plaintiff, as purchaser from the assignee in insolvency of W. J. Shaw & Co., of a debt due from the defendant to the insolvents.

It appeared that the insolvents assigned to one Boustead, an official assignee, in the form prescribed by the Insolvent Act of 1875, on 20th March, 1879. The sworn statement of assets included debts to the amount of \$10,780. The assignee collected some of the debts, amounting apparently to \$385, but gave no information as to what efforts were made to collect, having no personal knowledge of the matter, and his clerk, or whoever had the information, was not called as a witness. The uncollected debts were sold by auction *en bloc* to the plaintiff for \$2,400, being about twenty-four cents in the dollar of their nominal amount. The sale was said by the assignee to have been under the direction of the inspectors, but in what shape that direction was given or under what circumstances was not stated. The sale was advertised and was conducted by professional auctioneers at their sale rooms. It took place on 30th April, 1879. The defendant's debt, which was \$324.26, was among those sold.

It was objected on behalf of the defendant that the debt in question, being over \$100, could not be transferred to the plaintiff by a sale of the debts *en bloc*, and the Court directed the jury to find a verdict for the defendant. A rule *nisi* to set aside the verdict and enter it for the plaintiff was afterwards discharged.

From this decision the plaintiff appealed.

The case was argued on the 27th January, 1881 (a).

Rose, for the appellant. The sale took place under section 36, not under section 67, and the learned Judge erred in holding that the Act required the assignee to make a separate sale of this debt, because it amounted to more than \$100. It is true that at first sight section 67 seems to clash with section 36, but all difficulty is removed by the words of the former section, "except as herein otherwise provided." These words would be meaningless unless they referred to section 36. But the provisions of section 67 are not mandatory: *Maxwell* on Statutes, 342; *Smith's L. C.*, 415, 8th ed. Moreover, its provisions were not intended for the protection of the purchaser but of the creditors, and any objection to the non-observance of the formalities therein prescribed lies with the creditors: *Re Parsons*, 4 App. R. 179.

Murdoch, for the respondent. The intention of the Insolvent Act is that all debts over \$100 shall be sold separately unless there is a sale of the whole estate. The exception in section 67 on which the appellant relies, cannot be held to support his contention, as it clear that it only refers to a sale of the estate *en bloc*. At any rate it was a condition precedent, under section 67, that the assignee should endeavour to collect the debts before selling them, but it was not shewn here that he made such effort. It is urged that the meaning of the section is only directory, but the authorities shew that it is mandatory: *Maxwell* on Statutes, 347; *Re Parsons*, 4 App. R. 179, 184; *Dwarris* on Statutes, 68; *Clarke's Insolvent Act*, 7.

March 1, 1881. PATTERSON, J. A.—The facts as they are stated in the appeal book, meagre as they are, are probably all that it is necessary for us to know. Upon them the defendant rests his challenge of the validity of the sale—not disputing the justice of the claim against him, or the right of the assignee in insolvency to have

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demand and received payment of it, but resisting the action of the plaintiff on the ground that, under the circumstances shown by the evidence, the sale was not authorized by the statute, and therefore passed nothing to the plaintiff.

I shall not attempt an examination of the authorities which have been cited to establish the proposition that the assignee's power to sell is derived solely from the statute, and is limited by its terms; because as the statute deals expressly with the subject of the sale of debts, as indeed it does also with the sale of assets of other kinds, it is plain that the assignee was not intended to be entrusted with the uncontrolled power of disposition which might otherwise have been supposed to accompany the ownership vested in him by the assignment.

There are three sections of the statute which touch the subject, viz., the 36th, the 38th and the 67th. The 36th places the assignee under the orders of the creditors, or failing such orders, then under those of the inspectors, with regard to the mode, terms and conditions on which he may dispose of the whole or any part of the estate, but subject to a proviso attached to section 38, which forbids a sale of *the estate en bloc*, without the previous sanction of the creditors. The terms of sec. 38 require to be noted. It provides that "the assignee shall exercise all the rights and powers of the insolvent in reference to his property and estate. And he shall wind up the estate of the insolvent by the sale in the ordinary mode in which such sales are made, of all bank or other stocks, and of all movable property belonging to him, by the collection of all debts, or by the sale of the estate of the insolvent, or any part thereof, if such be found more advantageous, at such prices and on such terms as to the payment thereof as may seem most advantageous," with the restrictive proviso as to sales *en bloc*, and some other matters not material at present.

If these sections could be read without the 67th, there would be no room for disputing the power of the assignee to sell the debts, or any of them, subject only to the control of the creditors or inspectors. The sale of the estate

en bloc of course would include debts as well as all other assets, and to make assurance of its perfectly comprehensive effect more sure, a sub-section, added by 39 Vic. ch. 30, waived, in case of a sale *en bloc*, certain things prescribed by section 75 when lands were sold. A comparison of this section with those *in pari materia* in the Acts of 1864 and 1869, (viz. sub-sec. 8 of sec. 4 of 1864, and sec. 41 of 1869), and the addition of section 36, which was not in the former Acts, although some of its provisions were there, confirms this understanding. I do not think any different construction of these sections, taken by themselves, was suggested on the argument; but section 67 was relied on as forbidding a sale such as this one.

That section enacts that after having acted with due diligence in the collection of the debts, if the assignee finds there remain debts due, the attempt to collect which would be more onerous than beneficial to the estate, he shall report the same to the creditors or inspectors, and with their sanction he may sell the same by public auction, after such advertisement thereof as they may order; and pending such advertisement, the assignee shall keep a list of the debts to be sold, open to inspection at his office, and shall also give free access to all documents and vouchers explanatory of such debts; but all debts amounting to more than one hundred dollars shall be sold separately, except as herein otherwise provided.

Reading this section without reference to 36 and 38, it plainly forbids the sale of this debt, which was more than \$100, *en bloc* with others.

But it is argued for the plaintiff that the concluding words "except as herein otherwise provided" refer to those earlier sections, which contain the only other provisions on the subject; and I think that is so. It is further contended that, at all events, the provisions of sections 67 are only directory, and their non-observance cannot affect the title of a purchaser.

Section 67 had its counterpart in sub-section 11 of section 4 of the Act of 1864, and in section 44 of the Act of

1869. The words "except as herein otherwise provided" first appeared in the Act of 1869, which Act first authorized a sale of the estate *en bloc*. There can be no reasonable doubt that it was the exercise of that power, and only that, which was to take debts of more than \$100 out of the rule that required them to be sold separately. But sections 36 and 38 give powers in some respects more extensive than those vested in the assignee by the Act of 1869, particularly where they speak of the sale of the estate *or any part thereof*, words which, as already noticed, would authorize a sale of all or any of the debts apart from the other assets; and thus, it is urged, it is "herein otherwise provided" that the inspectors can sell as was done in this instance.

We should, I think, adopt a faulty principle of construction if we so read the statute. Section 67, in the arrangement of the Act of 1875, is separated from 36 and 38, evidently for the purpose of grouping together the clauses concerning the sale of debts and proceedings to recover debts sold, or prosecuted at the expense of individual creditors, in place of being placed, as the cognate clauses were in 1864 and 1869, amongst those relating to the powers and duties of the assignee. This cannot, however, affect the construction, and we must read the three sections together. There can be no difficulty in treating those provisions of section 67 which lead up to the sale as directory. The inspectors or the creditors, when they sanction the sale, must be taken to have satisfied themselves that the preliminary diligence has been bestowed on the attempt to collect the debts, and, although there might sometimes be reason to think, as perhaps in this case, that they were very easily satisfied, we cannot assume to review their decision. It is not unworthy of note, apropos of this matter, that the order of the Judge, which under the former Acts was necessary to authorize the sale, was dispensed with by the Act of 1875. But while all the power is given to the creditors or the inspector, so far as sanctioning a sale is concerned, the restriction against selling debts over \$100 otherwise

than separately, is one which they have no power to disregard. It is a limitation expressed in the very grant of the power to sell—a limitation of the power itself—and not of the nature of a directory mandate. It is known, being part of the law, to the purchaser, who can only take what the law authorizes the assignee to sell, and it does not authorize him to sell one of these debts to any person who does not buy it by itself, unless as in the statute otherwise provided.

When we look at section 36 or section 38 we find nothing, with the one exception of a sale of the whole estate, which will clash with the directions of section 67; and nothing suggestive of any necessity for declining to treat those directions as applicable to every other sale of debts. By section 36 the creditors may pass a "resolution or order directing the assignee how to dispose of the estate, real or personal." This does not, even in terms, touch a sale of part of the estate. "In default of their doing so the assignee shall be subject to the directions, orders, and instructions he may, from time to time, receive from the inspectors, with regard to the mode, terms and conditions on which he may dispose of the whole or any part of the estate." There is nothing in this inconsistent with the limitation of the power of the inspectors. Section 67 imposes certain duties on the assignee, to be discharged *with the sanction*, not in obedience to, the orders of the inspectors or the creditors. The distinction may be of little moment, but it is in the direction of preserving the force of both sections.

Then there is the direction of section 38 to the assignee to wind up the estate, and in so doing to sell it, or any part of it, if such be found more advantageous than winding it up, by selling bank and other stocks, and all movable property and collecting the debts. I am inclined to think that part, and perhaps the chief part of the design of this section, in its present shape, was to free the assignee from some of the perils by which trustees are beset, by giving discretion to sell in the ordinary modes, and even on credit.

But taking the power to sell and not the mode or terms to be its principal object, there is not a word in it that may not be read with the whole of section 67, particularly having regard to the limitation of the right to sell the estate or any part thereof to cases in which it "shall be found more advantageous," the criterion of which, with respect to debts, seems to be pointed out by section 67, and to be, when they are the part of the estate destined for sale, the fact that after due diligence in attempting to collect them it appears that any further attempt will be more onerous than beneficial. The primary duty is clearly marked as being the collection and not the sale.

I am therefore of opinion that there is no power to sell any debt of more than \$100 except by itself, unless in case of a sale of the whole estate.

The restriction seems to me a wise and salutary one in the interest of the creditors and of the insolvent. I find no power given to the inspectors to disregard it, and I find no evidence that either they or the creditors attempted in this case to disregard it. A sanction of the assignee's proposal to sell would not necessarily involve a direction to sell *en bloc*, without regard to the amount of particular debts; but even if an express order were made to sell in that manner it would be, in my judgment, beyond the power of the inspectors, and would afford no protection to a purchaser, who is bound to know the extent of the statutory right to sell.

I think the appeal should be dismissed, with costs.

BURTON, J. A.—I entirely concur in the judgment just pronounced.

By placing the construction upon the Act which we now do, full effect can be given to each of the sections referred to, which at the first blush might appear to be in conflict.

I feel unwilling to be bound by the mere technical rule, that the section does not contain absolute words of prohibition, or that the construction and character of the statute

must be determined by the use of affirmative or negative words or the mere phraseology of the particular section. We must, I think, look at the statute as a whole, and endeavour so to construe it that all its provisions may be harmonized, if possible. We do this, I think, by referring the words "except as herein otherwise provided," to a sale of the estate *en bloc*, in which case neither the requirements of this section nor of section 75 need be observed; but it is obvious that if for any reason it was deemed advantageous to sell a portion or the whole of the real estate separately, it would have to be advertised under section 75, whilst if sold with the rest of the estate, *en bloc*, no such steps need be taken. I think that the provision that all debts over \$100 shall be sold separately is in fact a limitation of the authority of the assignee to sell, his duty in the ordinary course being to collect, but if a sale is found desirable then to sell only in a particular manner.

As the law stood previously to the Act of 1875, it would have been the duty of the assignee to have made a special report to the creditors that due diligence had been made to collect the debts, and that it would be more onerous than beneficial to attempt further collections, and then, with their sanction, the Judge was authorized to make an order directing the assignee to sell by public auction, but the order would not have warranted a sale of debts over \$100 otherwise than separately; he can now do so without order of the Judge provided he makes a report and obtains the sanction of the creditors or inspectors. If the proceedings taken in this case are to be regarded as a fair specimen of the manner in which they were conducted under the Act of 1875, it would be perhaps desirable that Parliament in re-enacting an insolvent law, (as sooner or later must be the case,) should make an order of a Judge again essential to the validity of such a sale, for a more reckless disregard of the provisions of the law and the interest of creditors than we find in this case can hardly be conceived. From the evidence it would seem that no special efforts were made to collect, and no report whatever made

to the creditors or the inspectors, although it was elicited on a re-examination of the assignee that the inspectors directed a sale.

I think the judgment should be affirmed.

MORRISON, J. A. concurred.

Appeal dismissed.

OCKLEY ET AL. V. MASSON ET AL.

Statute of Frauds, Sec. 17—Agency—Evidence of.

In an action for the non-delivery of certain groceries sold: *Held*, that upon the evidence set out below, K., by whom the sale was made, was shewn to be the defendant's agent authorized to sell on their behalf.

K. entered the sale in a book which was not produced, but the plaintiff produced a list of the things ordered, and their prices; and K. afterwards sent the order in a letter signed by him to the defendants, who thereupon wrote the plaintiffs, "K. reports a sale that we cannot approve in full, but will accept for," enumerating certain articles. Upon the plaintiffs' insisting on the completion of the order in full the defendants cancelled it altogether.

Held, that the letters were a sufficient memorandum within the 17th section of the Statute of Frauds.

Held also, the letter from K. to the defendants might be assumed upon the evidence set out, to state that he had made a sale of the goods to the plaintiffs at the prices named in the list; and that as such letter was not produced at the trial, though called for by the notice to produce, the Court might, if necessary, presume that it stated anything further which might be necessary for the plaintiffs' case.

Held, also that the effect of the letter from the defendants to the plaintiffs was not impaired by the disapproval expressed therein of part of the order.

APPEAL from the judgment of the County Court of the county of Frontenac discharging a rule *nisi* to set aside the verdict entered for the defendants.

The plaintiffs sued the defendants for the non-delivery of certain groceries which they alleged they had purchased from them.

It appeared that the goods in question had been sold to the plaintiffs by one Kerr, who had on previous occasions sold goods for the defendants. One of the defendants swore that they paid Kerr a commission on sales approved of by them, and that he never had any authority to bind them on any sales; but they had never notified the plaintiffs of their relations with him. When the plaintiffs gave the order for the goods, which amounted in value to over \$200, Kerr entered it in a book which was not produced at the trial, but the plaintiffs produced a list of the things ordered, and their prices. The defendants admitted having received the order in a letter from Kerr,

signed by him, which they did not produce, (although required to do so by the notice to produce,) to which they had replied as follows: "Messrs. V. Ockley & Sons, Kingston,—Gentlemen, Mr. Kerr reports a sale that we cannot approve in full, but will accept for," &c., enumerating certain articles which, with their prices, corresponded with the list produced by the plaintiffs. The plaintiffs replied, insisting on the completion of their order in full, whereupon the defendants cancelled the whole order.

The case was tried before the learned Judge of the County Court of Lennox and Addington, sitting for the Judge of the County Court of Frontenac, and a jury.

There was some misunderstanding as to whether the learned Judge withdrew the case from the jury and entered a verdict for the defendants or directed the jury to find a verdict for the defendants, with leave to the plaintiffs to move to enter the verdict for them for \$30, if the Court should on the whole of the evidence be of opinion that they were entitled to succeed. Subsequently a rule *nisi* to set aside the verdict and enter it for the plaintiffs was discharged.

The plaintiffs appealed.

The case was argued on the 28th January, 1881.

Robinson, Q.C., for the appellants. There was abundant evidence to justify a finding that Kerr was the agent of the defendants, and the case should have been left to the jury, and not withdrawn from them. Even if the learned Judge did not withdraw it from the jury, he directed them wrongly in telling them that as a matter of law upon the evidence they should find a verdict for the defendants. See *Story* on Agency, 7th ed. sec. 73; *Howard v. Sheward*, L. R. 2 C. P. 148; *Smith v. McGuire*, 3 H. & N. 554; *Wharton* on Agency, sec. 125; *Whithington v. Herring*, 5 Bing. 442; *Doan v. Duncan*, 17 Ill. 272; *McGuire v. Shaw*, 12 C. P. 301. The letters put in at the trial shewed a memorandum of the contract

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within the meaning of the Statute of Frauds: *Gibson v. Holland*, L. R. 1 C. P. 1; *Buxton v. Rust*, L. R. 7 Ex. 79; *Wilkinson v. Evans*, L. R. 1 C. P. 407; *Browne* on the Statute of Frauds, secs. 350, 354.

Delamere, for the respondents. The evidence proves that Kerr was not the defendants' agent, but one who sent them orders for which he was paid a commission if they accepted them. There is nothing to shew that they held him out as their agent, or that they knew that he was acting as such, and such being the case the learned Judge was right in not leaving the question of agency to the jury: *Wright v. Skinner* 17 C. P. 317; *Giblin v. McMullen*, L. R. 2 P. C. 335. But there was clearly no writing to take the case out of the Statute of Frauds. In the memorandum proved neither party to the contract is named, and the letters are not sufficiently identified with it: *Benjamin* on Sales, 2nd ed., p. 180.

March 1, 1881. PATTERSON, J. A.—There are two questions for decision.

1. Was Kerr agent for the defendants?

2. Was there a sufficient memorandum within the 17th section of the Statute of Frauds?

The first question was eminently one for the jury, but, although the case was tried with a jury, it has, by the course taken at the trial, become a question for the Court. The verdict entered for the defendants was merely a formal verdict, entered in pursuance of the Judge's opinion that there was no evidence of agency to leave to the jury, but with a reservation of leave to enter a verdict for the plaintiffs for \$30, if the Court should, on the whole evidence, consider them entitled to succeed.

Under this reservation, I think we may fairly consider that we are merely asked to say if there was reasonable evidence of the agency, having regard to what was said by witnesses on both sides. We cannot doubt that if there was such reasonable evidence, the jury, had it been submitted to them, would have found for the plaintiffs. The

argument before us has proceeded very properly on this apprehension of the matter; and we have not so much been asked to find for the defendants on a careful balance of testimony, as to say that the issue was properly withdrawn—as it was practically, though not in form—from the jury. In this view, Mr. Delamere called our attention to a passage in the judgment delivered by Lord Chelmsford in *Giblin v. McMullen*, L. R. 3 P. C. at p. 335, stating the rule considered as settled by the case of *Ryder v. Wombwell*, L. R. 4 Ex. 32, that in every case, before the evidence is left to the jury, there is a preliminary question for the Judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed.

Now, we must bear in mind the familiar principle of evidence under which a fact is established against a litigant, or a presumption by which he is bound arises, by proof of conduct on his part such as, on a question of agency for example, amounts to holding out a particular person as his agent, either to the opposing litigant individually, or to the world in general, in reliance on which apparent state of things another has acted. Bearing this in mind, let us glance at the facts in evidence before us. Taking the testimony of the defendant Demasse Masson in the first place, we learn from him that Kerr had, on previous occasions, sold goods for the defendants. We learn that Kerr's way of doing business was not merely to take an order for transmission and acceptance or rejection, but to make a sale. He says, "We pay him a commission on sales approved by us." "He never had any authority to bind us on any sales." "We wrote him that he must only sell conditionally." "He reported a sale to plaintiffs." "We had repudiated one sale made by Kerr to the plaintiffs," &c.

Thus we have the character of what Kerr professed to do. Then, how far was the conduct of the defendants calculated to lead those who dealt with Kerr to suppose his authority was limited? Mr. Masson says the defendants

commenced doing business with Kerr in 1876. They saw him perhaps from five to eight times a year. They supplied him with their price lists. They never notified the plaintiffs of their relations with him. The repudiation, as he calls it, of the one order was by letter to Kerr, not by any communication with the plaintiffs. He does not contradict the statement made in evidence by Thomas Ockley, one of the plaintiffs, that other sales made by Kerr to the plaintiffs had been duly carried out by the defendants; but indirectly confirms it when he says they would have supplied these goods if they had not gone up in price. In October, 1877, they wrote to one of the plaintiffs respecting an order sent by Kerr, explaining that Kerr had made a mistake in the price of one article. The letter, so far from throwing doubt on Kerr's agency, was one which might have been written about an order taken by any one of the defendants themselves.

On the evidence of Mr. Masson himself, even without the strength added by the evidence of Mr. Ockley and that given by other gentlemen respecting Kerr's transactions generally, it would be impossible to refuse to hold that there was abundant evidence of his being held out as an agent for making sales.

The law is so fully explained in *Chitty on Contracts*, 11th ed., 198, under the head of Contracts with Agents, that it is not necessary for me to cite particular decisions. One of the cases there noted, viz, *Summers v. Solomon*, 7 E. & B. 878, is very applicable to the facts before us. Even the effect of carrying out previous sales made by Kerr, is concisely expressed by the words of Lord Campbell at p. 884: "The nephew had ordered goods to be sent to Lewes, which the defendant had received and paid for. That was evidence upon which a jury might well suppose the nephew to be the defendant's general agent for conducting the business." The general doctrine is thus stated by Coleridge, J.: "The question is, not what was the actual relation between the defendant and his nephew, but whether the defendant had not so conducted himself as to make the plaintiff suppose

the nephew to be the defendant's general agent. What passes between the defendant and his nephew cannot limit the defendant's liability to the plaintiff." The case, moreover, is a precedent for referring the question to the Court, as was done in the present case.

The question of agency must be therefore found for the plaintiffs, and the fact taken to be that Kerr had authority to sell goods for the defendants.

Then it appears that he did sell the goods which the defendants are now sued for refusing to deliver. By a sale I mean a transaction by which the plaintiffs were bound to accept the goods as well as the defendants to deliver them; bound, that is, by the terms of the bargain, though not necessarily by a writing signed by them; for, as remarked in *Thornton v. Kempster*, 5 Taunt. 788: "It had been urged that contracts might subsist, which by reason of the Statute of Frauds could be enforced by one party, though they could not be enforced by the other party; but the statute," it was explained, "in that respect threw a difficulty in the way of the evidence; the objection did not interfere with the substance of the contract; and it was the negligence of the other party that he did not take care to obtain and preserve admissible evidence to enable himself also to enforce it." Apart from the statute, it has not been disputed that such a sale was made, and the whole tenor of the evidence either states or assumes it.

We come, therefore, to the question, was there a note or memorandum of the bargain signed by the defendants or by their agent thereunto lawfully authorized?

The plaintiffs' evidence shows that their order was given to Kerr and entered by him in a book. They are able to produce a list, made from or compared with the original order, showing the goods and their prices, but have not a copy of anything else. It is obvious that Kerr must have entered something more in his book, if it were only the name of the persons whose order he was taking. But on this point, as on the other, we have more information from the defendants than from the plaintiffs. Mr. Masson said,

"I remember getting the order last October, from Kerr for plaintiffs. I have not the letter in which Kerr enclosed us the order. I think we sent that letter to Mr. Britton. The letter was sent to us in the usual way. It contained one order; Kerr signed the letter." And the defendants wrote to the plaintiffs thus:

"Montreal, 22nd October, 1879.

"Messrs. V. Ockley and Sons, Kingston,—Gentlemen: Mr. Kerr reports a sale that we cannot approve in full, but will accept for," &c., enumerating certain articles, which, with their prices, correspond with the list produced by the plaintiffs. In answer to this, the plaintiffs wrote insisting on the completion of their order in full, and the defendants replied, cancelling the whole order.

The letter written by Kerr and referred to in the defendant's letter of the 22nd October, was not produced or accounted for, though called for on notice to produce. Mr. Britton, who was mentioned by the defendant, was attorney for the defendants in the action, and conducted the defence as their counsel.

We have thus the fact that Kerr wrote a letter to the defendants with the order. We do not know precisely what the letter contained, but we may assume that it stated that he had made a sale of the goods to the plaintiffs on behalf of the defendants, and at the prices named on the list. The letter of the 22nd October, and what Mr. Masson tells us of Kerr having made other sales for the defendants, supply the materials for this assumption. If important for the plaintiffs' case to presume that it contained anything further, authority will be found for making such a presumption, against the defendants who withheld the letter, in the cases cited in *Broom's Legal Maxims*, in illustration of the rule, *omnia præsumentur contra spoliatorem*.

The circumstance that the correspondence was between defendants and their own agent would make no difference. "The object of the Statute of Frauds"—to quote from the judgment of Erle, C. J. at p. 5, in *Gibson v. Holland*, L. R. 1

C. P. 1—"was the prevention of perjury in the setting up of contracts by parol evidence, which is easily fabricated. With this view, it requires the contract to be proved by the production of some note or memorandum in writing. Now, a note or memorandum is equally corroborative, whether it passes between the parties to the contract themselves, or between one of them and his own agent." The same point was decided in *Allen v. Bennett*, 3 Taunt. 169; and see the judgment of Lord Cranworth, in *Ridgway v. Wharton*, 6 H. L. C. 257.

Here, however, the letter which states the agent's report of the sale, is addressed to the plaintiffs themselves, and, under the circumstances, is quite sufficient proof to satisfy the statute. The effect of the sale so made and noted by Kerr, is not impaired by the disapproval expressed in the letter, of a part of it. The plaintiffs do not depend on establishing a sale made by the defendants themselves, or a note or memorandum of such a sale as made by them. They rely on the sale as made by Kerr, the defendants' agent, and on his memorandum thereof, communicated to the defendants and acknowledged in their letter as having been reported to them: *Bailey v. Sweeting*, 16 C. B. N. S. 843.

The appeal should be allowed with costs, and a verdict entered for the plaintiffs for \$30, pursuant to the leave reserved.

BURTON and PATTERSON, JJ.A., concurred.

Appeal allowed.

CRAIG V. DILLON.

Agreement—Liquidated damages or penalty.

The defendant, who had trespassed on the plaintiff's land by placing stones and commencing to build a stone fence thereon, entered into an agreement to remove the same before the 15th of December, unless, upon a re-survey, which he had the privilege of having made before the 15th November, it was found that the line run by one S., a surveyor, was not the correct line, or unless defendant should fail to have such re-survey; and he agreed "to pay to the plaintiff the sum of \$200 as liquidated damages if the said stones and stone fence are not removed, as hereinbefore agreed, at the times mentioned in this agreement."

Held, affirming the judgment of the County Court, that the sum mentioned was not a penalty, but liquidated damages for the omission to perform a specific act, viz., the removal of the stones and stone fence.

APPEAL from the County Court of the county of Carleton.

The parties to this suit had a difference in reference to the division line between their respective properties. The defendant brought a quantity of stone from the plaintiff's land, and commenced building a fence upon what the plaintiff claimed to be his land, and refused to remove them; and the plaintiff thereupon brought an action of trespass in the Queen's Bench, which was compromised after being entered for trial, and the terms of that compromise were embodied in the agreement now sued on.

On the day before the agreement was executed the line was run between the two properties by Mr. Sparks, a Provincial Land Surveyor. The line as thus run proved that the defendant had trespassed by placing the stones and commencing to build the fence entirely upon the plaintiff's land.

The agreement in question fixed the damages for which judgment was to be entered in that suit.

It then provided that each party should bear half the expenses of the survey so made by Sparks.

It provided that the defendant should have the privilege of having a resurvey before the 15th November following, and failing so to do, or if, upon such resurvey, the line then run should correspond with Spark's line, then the defen-

dant bound himself before the 15th December to remove the stones and the stone fence, to the line run by Sparks, or at all events, off the plaintiff's land.

Then came the stipulation in question, which was in these words:—"And the said defendant hereby further agrees to pay to the plaintiff the sum of \$200 as liquidated damages, if the said stones and stone fence are not removed as hereinbefore agreed at the times mentioned in this agreement."

The defendant did not have a resurvey, and neglected to remove the stones and stone fence before the day named in the agreement, viz., the 15th December, whereupon the plaintiff sued the defendant upon the agreement.

The case was tried before the Judge of the County Court of Carleton and a jury, when it appeared that at the time of the trial the stones had been removed, and the fence moved to the line run by Sparks. A verdict was rendered for the plaintiff and the actual damages assessed at \$25. Subsequently a rule *nisi* to increase the verdict to \$200 was made absolute.

From this judgment the defendant appealed.

The case was argued on the 27th January, 1880 (a).

Richards, Q. C., for appellant. The agreement provided for two things, the removal of the stones and the stone fence, and it was shewn that the appellant had removed all the scattered stones before the 15th of December. The breach, therefore, was only as to the removal of the fence to the correct line, and he should not be held liable for the \$200, the same as if he had performed no part of his contract. If the judgment of the learned Judge of the County Court is right, the appellant would be liable for the full amount if he left one stone on the respondent's land. But it is quite clear the \$200 was intended as a penalty and not for liquidated damages. The use of the expression "liquidated damages," in an instrument is not conclusive, as the Court will look at

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the whole agreement to ascertain the intention of the parties. Here the same amount was fixed for the non-removal of a stone or the fence, and the rule is clearly stated in the cases to be that where one sum is recoverable for the performance of several things of various degrees of importance, even though the agreement expressly provides that it shall be treated as liquidated damages, and not as a penalty, it will nevertheless be construed as a penalty: *Dimech v. Corlett*, 12 Moo. P. C. 229, 230; *McPhee v. Wilson*, 25 U. C. R. 169; *Magee v. Lavell*, L. R. 9 C. P. 107; *Mayne on Damages*, 158; *Astley v. Weldon*, 2 B. & P. 346; *Price v. Green*, 16 M. & W. 346; *Kemble v. Farren*, 6 Bing. 141; *Betts v. Burch*, 4 H. & N. 506; *Hinton v. Sparkes*, L. R. 3 C. P. 161; *In re Newman*, L. R. 4 Ch. D. 724; *Ainslie v. Chapman*, 5 U. C. R. 313; *Brown v. Taggart*, 10 U. C. R. 183; *Atkins v. Kinnier*, 4 Ex. 776; *Sparrow v. Paris*, 7 H. & N. 594; *Saintier v. Ferguson*, 7 C. B. 716; *Galsworthy v. Strutt*, 1 Ex. 659.

Bethune, Q. C., for respondent. There is no dispute as to the law, the only question is as to its application to the facts of this case. The simple point for the decision of the Court is, whether the agreement provides for payment of the sum named in respect of one act, as we contend, in which case the amount would clearly be liquidated damages. This must be determined by the contract itself at the time it was made, not by subsequent events. Upon the true construction of the agreement, it is clear that the removal of the stones and stone fence were contemplated as one act.

March 1, 1881. BURTON, J.A.—The rule contended for by Mr. Richards, on the question whether a sum is to be considered a penalty or liquidated damages, is now well established—viz., that where the same sum is stipulated as recoverable for the breach of several matters of various degrees of importance it shall be regarded as a penalty and not as liquidated damages, even though the agreement

states not only affirmatively that it shall be taken as liquidated damages, but negatively also, that it shall not be taken as a penalty. This was very frankly admitted by Mr. Bethune, but he contended that this agreement, though providing for several matters, confined the stipulation as to the sum agreed upon as damages to the omission to perform a certain specified act by a time agreed on; and this, I think, is the proper view to take of this agreement, looking at the circumstances under which it came to be executed.

The stipulation in question was as follows: "And the said defendant hereby further agrees to pay to the plaintiff the sum of \$200, as liquidated damages, if the said stones and stone fence are not removed as hereinbefore agreed at the times mentioned in this agreement."

It is urged that this clearly refers to at least two distinct acts, and so comes within the rule I have mentioned, and must be construed as a penalty; but I think that what the parties were stipulating for was, that these stones, whether fixed or otherwise, should by a certain day be removed from the plaintiff's land, and they chose to fix the amount of damages for the omission to perform that specified act by a certain time. The actual damages sustained by the non-removal for a day or a month or six months might be, and from the nature of the property must have been small; but the continuance of the fence and stones for over ten years might lead to trouble, and it is reasonable to assume that the plaintiff had this in view when he stipulated for the payment of a certain sum if the stones were not removed by a certain time. Reading these words in their ordinary sense, and bearing in mind that what both parties had in view was the establishing the true line between the properties, and that the stones should be moved off the plaintiff's property within a certain time, after that line was established, I can conceive no case in which we could hold that an engagement for payment of liquidated damages could be made, if this is not one.

The defendant, by not exercising the right reserved to him by the agreement, of having another line run by the 15th November, acquiesced in the correctness of Sparks's line, and was thereupon bound to remove the stone from the plaintiff's land within a month, or pay a certain sum as damages for omitting to do so.

Upon the finding of the jury they were bound to assess the damages agreed on between the parties, and, as I understand the case, the Judge, who was of that opinion, merely directed them to assess the actual damages proved to avoid the necessity of a new trial.

The judgment should, in my opinion, be affirmed, and this appeal dismissed, with costs.

PATTERSON and MORRISON, JJ.A., concurred.

Rule dismissed.

KEEFER V. MERRILL.

Fixtures—Mortgage of freehold—Unattached machinery.

Mortgagors of vacant land, adjacent to their foundry, which was constructed of stone, erected thereon a frame building as a lean-to to the foundry, and placed in it three lathes, an iron planer, two drills, a crane and a shaper, all of which, with the exception of one drill, which was bolted to the frame work, the latter being bolted to the girders, were kept in their position by their own weight, without being fastened to any part of the building, and were capable of being removed without injury to either building or machinery. When the mortgage was given the land was not worth the money advanced, but the mortgagees relied on a substantial building which the mortgagors intended to erect on it as an extension to their factory, and took a covenant to insure the building for \$4,000, but they did not bind the mortgagors to build or to put in machinery.

Held, reversing the decree of SPRAGGE, C., that the machines were not fixtures, as they were not put in the building with the intention that they should become part of the realty.

Held, also, that the mere fact that such machines are brought upon the land by the owner of the freehold raises no presumption that he intends to make them part of the realty.

Per PATTERSON, J.A., the weight of authority is against construing as fixtures anything which is not annexed in fact to the realty, except where the articles form part of the fabric, as an integral portion of the architectural design, or as in the case of a mill stone, which is an essential part of the mill.

McDonald v. Weeks, 8 Gr. 297, dissented from.

THIS was a foreclosure suit.

The plaintiff was the surviving mortgagee of premises in Ottawa, viz., part of lot number one, on the south side of Middle street, on Victoria Island. The mortgage was made by Horace Merrill and Joseph Merrill Currier, on the 19th May, 1873, to the plaintiff and the late Mr. J. B. Lewis, trustees, to secure \$4,000 and interest. The money had been lent before that time and had been secured by a mortgage on other property, which was released, and this mortgage taken in its place. The part of lot one, covered by this mortgage, adjoined on the east a stone building belonging to Merrill and Currier, where they had a foundry and machine shop. It was vacant land when the mortgage was made; but it was then the intention of the mortgagors to build upon it by way of extending their factory. In its vacant condition it was not sufficient security for the money; whereas the security which was released had been sufficient. The mortgagees

relied upon the proposed building to increase the value of their security, and in fact took a covenant, in the statutory short form, to insure the buildings on the lands for \$4,000. They did not, however, bind the mortgagors to build. The proposed addition was made, but instead of a building of stone, like the other, a wooden structure was erected, as sort of lean-to to the stone building, into which a doorway was broken. It was a substantial enough house of its kind, but of comparatively little value as security to the mortgagees. The controversy in the present suit related to certain machines which were placed in the wooden building; viz., three lathes, an iron planer, two drills, a crane and a shaper. All of these were kept in position by their own weight without being fastened to the floor or to any part of the building, except one vertical drill, which was called an over-head drill, and was described as having been bolted to the frame-work, and the frame-work bolted to the girders. The machines were worked by water power at the other side of Middle street, by means of a shaft carried under the street. The firm of N. S. Blasdell and Co., which comprised the two mortgagors, became insolvent, and their interest in the foundry passed from their assignee in insolvency to the defendant, who removed the machines from the wooden building, and from the mortgaged portion of the foundry.

The learned Chancellor, before whom the case was heard at Ottawa in May, 1880, held at the hearing following *McDonald v. Weeks*, which he regarded as having been affirmed by subsequent decisions, that the articles were fixtures, and awarded an injunction commanding the defendant to restore them within a month.

The defendant appealed.

The case was argued on the 22nd December, 1880.

W. Cassels and *Walker*, for the appellant. In deciding this case, the learned Chancellor only followed the case of *McDonald v. Weeks*, 8 Gr. 297, by which he felt

(a) *Present*.—BURTON, PATTERSON, and MORRISON, JJ.A., and BLAKE, V.C.

himself bound, and he intimated that it was a case upon which the Court of Appeal should pronounce. Under these circumstances we submit with confidence that we are entitled to succeed on this appeal. That the law is not as laid down in *McDonald v. Weeks*, a review of the authorities will show. Although the Chancellor was under the impression that that case had been followed in all the subsequent cases, it appears that VanKoughnet, C., took a different view of the law in *Patterson v. Johnson*, 10 Gr. 583; and in *Crawford v. Findlay*, 18 Gr., 50, it was to a certain extent dissented from. It is submitted that upon the true construction of the decisions the machinery in question were not fixtures, and did not pass under the mortgage to the respondent. The machinery was retained in its position by its own weight. It was run and worked by motive power from another building, and the evidence shows that the building and machinery embraced in the mortgage did not form a complete machine shop capable of being worked and used by itself. It was proved that it was not necessary for the proper working of the business that the whole of the machinery should be run, but that the business could be carried on by a portion of the machinery if the balance were removed. Moreover the mortgagees themselves did not consider the machinery to be fixtures; and there is an utter absence of any evidence whatever that when the mortgage was executed it was intended that the machinery should be mortgaged to the respondent. They cited *Gooderham v. Denholm*, 18 U. C. R., 203; *Hope v. Cummings*, 10 C. P. 119; *Mather v. Fraser*, 2 K. & J. 536; *Holland v. Hodgson*, L. R. 7 C. P. 328; *Hutchison v. Kay*, 23 Beav. 413; *Metropolitan Counties, &c., Society v. Brown*, 26 Beav. 454; *Hill v. Wentworth*, 28 Verm. 429-436; *Schreiber v. Malcolm*, 8 Gr. 433; *Ex parte Moore and Robinson's Banking Co.* L. R. 14 Chy. D. 379; *Dewar v. Mallory*, 26 Gr. 618; *Tyler on Fixtures*, 114, 126, 128; *Ewell on Fixtures*, 22, 307, 15, 17, 31, 24; *Fisher on Mortgages*, 31; *Fullam v. Stearns*, 30 Verm. 443; *Gibbon on Fixtures*, 15; *Browne on Fixtures*, 1, 2, 3rd ed., and *Hellawell v. Eastwood*, 6 Ex. 295.

Delamere and *Black* for the respondent. The doctrine laid down in *McDonald v. Weeks*, upon which this case was decided, has been acted on ever since 1860, and no reason has been shown to induce this Court to hold that it was wrongly decided. It is there expressly held that where articles for the purpose of trade are put up by the owner of the inheritance, as was the case here, that the object and purpose is to improve the inheritance, and that they belong to the inheritance. It is clearly shewn by the evidence that the machines were intended by the mortgagors to become affixed to the freehold, and so to constitute part of the security embraced in the mortgage. Being part of the freehold the machines became vested in the respondent under his mortgage without being specially mentioned therein. The evidence shows that the mortgagors expressly agreed with the respondent, prior to the execution of his mortgage, to place the machines upon the land in question for the purpose of making it a good security for the sum advanced. They cited *Fisher v. Dixon*, 12 Cl. & F. 312; *Walmsley v. Milne*, 6 Jur. N. S. 125; *Grant v. Wilson*, 17 U. C. R. 144; *Harris v. Malloch*, 21 U. C. R. 83; *Ewell* on Fixtures, 21; *Browne* on Fixtures, 16, 61, 62.

March 1, 1881. BURTON, J. A.—This was a foreclosure suit, the only point contested being the right of the mortgagees to enforce by injunction the replacement upon the mortgaged premises of certain machinery claimed to be fixtures, which had been removed by the defendant.

The learned Chancellor of Ontario, before whom the case was heard, held, following his decision in *McDonald v. Weeks*, 8 Gr, 297, which was given in 1860, that the articles in question were in fact part of the realty, and consequently gave judgment for the plaintiff, and awarded an injunction commanding the defendant within a month to restore them, and restraining the sale of them. The appeal is against that decision, and was in fact almost invited by the learned Judge, who expressed a similar wish when giving

his judgment in the former case, which, having since been followed by the Court of Chancery, he held to be binding upon him.

The learned Judge at that time commented upon the great confusion and contradiction among the authorities in determining what are the tests as to whether an article is a fixture or a mere chattel ; and although many cases have been since decided, I doubt whether they have diminished the difficulty in arriving at a conclusion, inasmuch as it is a question which must depend to a very great extent upon the circumstances of each case.

When the article in question is no further attached to the land than by its own weight, it is generally to be considered a mere chattel ; but even in such a case, if the intention is apparent to make the thing part of the land, it becomes part of the land.

This is well exemplified in the case of *D'Eyncourt v. Gregory*, L. R. 3 Eq. 382, in which certain marble figures in the great hall of the family mansion and the sculptured marble vases were decided to be fixtures. The question being held not to depend on whether any cement was used in fixing them or whether they rested by their own weight, but upon this, whether they were strictly and properly part of the architectural design for the hall and stair-case itself, and put there as such, as distinguished from mere ornaments to be afterwards added. The learned Judge who decided that case, admitted that the distinction between such statues as might be added by way of ornament, and such as belong to an architectural design, and form part of the design itself, might be extremely thin ; and that evidence would have to be resorted to in each case to determine whether the article fell within or without the line ; and held in the same case that a chimney glass and ornamental frame, and the oil painting surmounting it, appeared to be no part of the house itself or of the wall, but to be merely ornaments attached to it, and so did not go with the inheritance.

In the case of *Holland v. Hodgson*, L. R. 7 C. P., Mr.

Justice Blackburn uses this language at p. 335 : " Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land unless the circumstances are such as to show that they were intended to be part of the land, the *onus* of showing that they were so intended, lying on those who assert that they have ceased to be chattels ; and that, on the contrary, an article which is affixed to the land, even slightly, is to be considered as part of the land, unless the circumstances are such as to show that it was intended all along to continue a chattel, the *onus* lying on those who contend that it is a chattel."

Mr. Ewell thus refers to the subject at p. 21 : " Undoubtedly physical annexation exists in the great majority of cases under this branch of law, and is an important, and often, as bearing upon the question of intention, a controlling element in determining the question whether an article is or is not a fixture ; but the weight of modern authority and of reason, keeping in mind the exceptions as to constructive annexation admitted by all the authorities to exist, seems to establish the doctrine that the true criterion of an irremovable fixture consists in the united application of several tests : 1st. Real or constructive annexation of the article in question to the realty ; 2nd. Appropriation or adaptation to the use or purpose of that part of the realty with which it is connected ; 3rd. The intention of the party making the annexation to make the article a permanent accession to the freehold, this intention being inferred from the nature of the article affixed, the relation and situation of the party making the annexation, and the policy of the law in relation thereto, the structure and mode of the annexation and the purpose or use for which the annexation was made. Of these three tests, the clear tendency of modern authority seems to give pre-eminence to the question of intention to make the article a permanent accession to the freehold, and the others seem to derive their chief value as evidence of such intention." The exceptions referred to as constructive annexations, being

those articles which are not themselves annexed, but are deemed to be of the freehold from their use and character, such as the vases to which I have referred, mill stones, the ordinary snake fences, and the like.

To these may be added as coming within the same principle, in the case of a deed or mortgage of a manufactory, that portion of the machinery of such manufactory, whether the same be fast or loose, which is essential to the operation of the fixed machinery and intended to be used as part of it, and without which it would be useless, and the building no manufactory at all.

In the case we are now considering, the building and machinery in it were placed upon the land subsequently to the execution of the mortgage. Evidence was given to show that the land itself was an insufficient security for the mortgage money, and it was attempted to be shown that there was an express agreement on the part of the mortgagors, prior to the execution of the mortgage, to place the machines upon the land for the purpose of improving the security. It is unnecessary to consider the effect of a parol agreement of that nature, not referring to specific machinery, but generally to articles not then in existence, or its admissibility in evidence as being in conflict with the writing itself, inasmuch as it is clear that no such agreement was proved. The statements of Mr. Lewis, the co-trustee, to the plaintiff, were not evidence against the defendant; and the only other evidence offered, that of Mr. Currier, wholly fails to establish any such agreement; and the writing itself tends in a contrary direction. Not a word is said about machinery, the covenant which has been relied on being merely to insure the buildings on the land to the amount of the mortgage money. It may be that the mortgagees expected that a substantial stone building similar to the rest of the foundry would be erected, or they may have contemplated the affixing of valuable machinery, but any conclusion upon the matter must be merely conjectural. No proof was given of any agreement or representation

upon which the mortgagees relied, and it would be most unsafe to give weight to loose conversations on the subject depending on the recollection of witnesses, where the parties have reduced their agreement to writing and have not chosen to refer to it in the document itself.

The case is, therefore, narrowed to the question of, whether it comes within the decision of *McDonald v. Weeks*, and whether the rule laid down in that case is sustainable.

In that case the mortgage itself purported to grant "all and singular the steam mill and the machinery and appurtenances thereof, whether the same be in the nature of fixtures appertaining to the realty, or whether the same be in the nature of chattels." All were intended to pass, although if any retained their character of chattels, the transfer would be void as against execution creditors.

I was never quite clear as to whether the judgment in that case intended to proceed upon the ground that the articles then in question all formed parts of one whole machinery of one kind, without which the rest would be useless, in which case upon the authorities the decision might be sustainable, or upon the more general ground, which the learned Chancellor has in the present case formulated in a manner to which I am unable to agree, and which, with the most unfeigned respect for any decision of that experienced and learned Judge, will I think, be found to be unsupported by authority. He thus states that rule in his judgment: "In regard to the general rule when a man is the owner of the freehold and puts anything upon it, articles of this kind, the law attributes to him the intention that it shall form part of the land itself."

It is said that the case of *McDonald v. Weeks* has been ever since followed by the Court of Chancery; but I think this must be taken with some qualification. In *Patterson v. Johnson*, 10 Grant 583, decided in 1864, the late Chancellor VanKoughnet, whilst agreeing with Spragge, V.C., that the presumed distinction between nails

or screws and articles attached by their own weight was a flimsy one, held that where there was no evidence of intention to make an article in itself a chattel part of the realty, and no act of affixing in fact, the article still remained a chattel. I extract largely from his judgment, not only on account of his reasoning upon this point, but because I think his remarks are peculiarly applicable in reference to the building itself, as to which I shall presently have something to say. After stating the facts, he proceeds at p. 585: "I have read carefully and with great interest the judgments of the Queen's Bench here in *Gooderham v. Denholm*, 18 U. C. R. 203, and of my brother Spragge in *McDonald v. Weeks*, 8 Grant 297. I think there is strong reason and good sense in the remarks of my brother Spragge in the latter case. It does seem in many cases that could be put, but a flimsy distinction that articles are fixtures when nailed or screwed or bolted into a building, and are not so when their own weight gives them steadiness in their place without such aid. Take the case of a house which by its own weight sustains its position on the ground; the owner does not want a cellar perhaps, has no need to let it into the ground or to require any foundation for it other than the surface of the ground itself. Could it be said that this was a chattel which did not pass under a deed of the land, which the owner evidently intended to improve and benefit by the erection of it? But while there might be little difficulty in treating such a structure as part of the realty, the character to be given to articles of less bulk, such as machines used on the realty or in connection with the fixtures (in the literal sense of the term) erected on the land, is not so plain. Where such an article as a boiler or an engine is built into a house or fastened upon the land, it may well be called a fixture; it literally is so, and the owner may be considered as having devoted so much of the realty, at all events, as is necessary for the use of such machinery to the purpose of it, and as having thus intended to benefit the realty. But there is a great difficulty

in extending this character to articles of machinery which have not been actually affixed to the land, such as those in question here. As I understand the evidence, the defendant erected a machine-shop, into which he fastened a boiler and engine. With this engine, to the extent of its power, he could drive any machinery for which the building was adapted, and which he chose to introduce into it. He has there at present a circular saw, a wood-planer, and lathes. He may choose to abandon this description of machinery, and introduce something else. He has not in any way declared his intention of making these part of the realty; he has not in fact made them part by attaching the one to the other. The articles are all portable—can be moved by hand from place to place in the building, and out from the building. It is true they are there to be used with certain fixed machinery, with which they can be connected from time to time for the purpose of moving them. But can I say that for this reason they have become fixtures? * * While in many cases articles which have been merely attached to the freehold by nails or screws have been held removable as chattels, when this can be effected by simply drawing the nails or screws without doing damage, I find no case in which portable machines, such as the present, have been treated as fixtures irremovable, when they have not been fastened or attached in some way to the land. This distinction seems to be preserved, not merely for convenience, but because the law leans in favour of trade by treating, when it properly can, articles used in trade as disposable chattels. While, as I have already remarked, on the one hand, the distinction between articles rested by their own weight in a particular position, and articles sustained in it by nails or bolts, seems a flimsy one, and not readily sustained by any principle (a distinction, however, not always preserved, as pointed out before); on the other hand, where this evidence of intention to make any article, in itself a chattel, a part of the realty, and when the act of affixing it there are wanting, it will be almost impossible, in any case, to say what things

remain chattels, and what have become part of the freehold."

The case of *Crawford v. Findlay*, 18 Gr. 51, was decided by Mr. Justice Strong, in 1871, and having been concerned in that case when at the bar, I am familiar with the facts and am in a position to say that it is no authority for the rule laid down in this case.

In that case, the mortgagors had purchased a factory complete with all its machinery, and in the agreement of purchase it was stipulated that on payment of \$1,500, the vendor should execute a conveyance to the purchasers, who should give back a mortgage; and the agreement contained a condition that until the purchase money was fully paid, they would not remove the machinery. The defendant Findlay was the assignee in insolvency of the mortgagors, and was bound by the same equities as affected them, and the case might have been disposed of on that ground alone, but the learned Judge held that the plate and papers used with the press, which was itself a fixture, although of course not attached in any way to the building, were to be regarded as constructive fixtures, as articles of a similar character were held to be by Lord Justice Giffard in *Ex parte Astbury*, L. R. 4 Chy. 630.

The learned Judge felt some difficulty in holding that machines kept in their places by cleats only were to be regarded as fixtures, but having regard to the fact that the whole was sold together, not distributively as lands and chattels, but as a factory or one whole concern, that the machines were all indispensable to the working of the factory, he held them to be so.

Upon this branch of the case, I must confess I do not share the doubts of the learned Judge, but consider it plain upon the authorities that the factory having been conveyed *eo nomine*, and the articles in question being essential parts of it, necessary for the operation of the other fixed machinery, and without which it would be useless, and all treated by the grantors who had a right to

deal with it either as realty or personalty as realty, would have passed without the aid of the artificial fastenings, which were there used to steady them in working.

The decision in *Metropolitan Counties, &c., Society v. Brown*, 26 Beav. 454, in 1859, affords a good illustration of this view upon the first point. There, an anvil, though not fixed in any way, passed with a steam hammer, as it formed an essential part of the machine, which would be incomplete without it, whilst cutters and the bed-plate not fastened to the ground by any process, though the bed-plate was very heavy, straightening plate and metal flooring of the mill, quite loose, did not pass.

It appears to me that there is no difference of opinion among the judges to whose decisions I have referred, upon the main point: viz., that in all cases the question of intention is mainly to be looked at; the difference arises in considering what is sufficient evidence of that intention. I think it impossible to hold that the mere circumstance of the machines being brought upon the land by the owner of the freehold, raises a presumption that he intended them to become part of the realty; although the slightest annexation might raise a presumption that he intended to improve the land and make them a permanent accession to the freehold.

The difficulty that the plaintiff labours under here is, that there is no evidence *aliunde* to explain the intention, and that there is no annexation in fact from which, looking at the relation of the parties, an inference of an intention might be gathered. His is, therefore, the case of a mortgagee of the freehold, claiming that machinery brought upon the mortgaged premises passed to him, although the mortgagor may have studiously avoided annexing them to the freehold with a view to prevent its doing so.

I have referred to the cases cited by the plaintiff's counsel, but they do not, in my view, aid his argument.

I have already referred to the peculiar grounds governing such cases as *D'Eyncourt v. Gregory*, L. R. 3. Eq. 382.

Grant v. Wilson, 17 U. C. R. 144, merely establishes that machinery once affixed to the freehold, and which had passed to the mortgagee, did not cease to remain his property merely from the circumstance that it had been disconnected for the purpose of repairs.

I entirely agree with the view taken by the Chancellor of the evidence in relation to the building, and am satisfied not only that it was intended to be a permanent building, but that it was intended to form a portion of the stove foundry to which it was attached, and I entertain no doubt that it would pass under a mortgage of the land. It is only important in this view that one of the machines was shown to be actually fastened to it, and applying the rule enunciated by Mr. Justice Blackburn, that an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to show that the article was intended all along to continue a chattel, it becomes necessary to consider whether the circumstances here displace the presumption. I am of opinion that they do, and that no distinction can be drawn between this drill and the other articles brought upon the premises at the same time.

The decree, therefore, should be varied by declaring that the machinery was chattel property, and not comprised in the mortgage, and this appeal allowed, with costs.

PATTERSON, J. A.—If the machines in question were chattels, the assignee had a right as against the plaintiff to remove them; but if they were fixtures, and had as such, become part of the realty, they belonged to the mortgagee until the mortgage should be paid. The question, therefore, is, were they fixtures?

I do not notice the questions, which were debated at the hearing before the Chancellor, respecting the character, permanent or temporary, of the building, or whether it was the design, in erecting it and placing the machines

there, to extend the business, or merely to provide for an expected contract for pumps in connection with the water works. I take those things to be settled by the finding of the Chancellor.

We have, therefore, a building erected for the purpose of carrying on a manufacture for which lathes, drills, planer, and shaper were essential. I do not know about the peculiar importance of the crane, but I fancy its value was comparatively trifling. There were other pieces of apparatus mentioned, such as vices and the benches to which they were screwed, and a grindstone, but they are not in question at present. Those things which were essential to the business intended to be carried on in the building were placed in it for the purposes of the business, but were not, with the one exception, affixed to the freehold, being capable of being moved without injury to either building or machine, and used elsewhere. The overhead drill could doubtless be also detached and moved without injury to it or to the building, though I do not find that directly stated in the evidence.

The learned Chancellor lays some stress in his judgment upon the circumstances connected with the exchange of securities, particularly a stipulation, which he regards as established, that something was to be done to increase the value of the land covered by the second mortgage. I am not sure that I apprehend correctly the exact character of the stipulation referred to. I do not doubt that the mortgagors intimated their intention to build, and I feel equally certain that Mr. Lewis, who transacted the business, relied on the building to make the security sufficient. But he refrained from taking any formal agreement; and if we should be able to discover that any agreement was made, by oral representations or promises, there would be a difficulty, which for my part I do not see how to surmount, apart altogether from the Statute of Frauds, in arriving at any particulars or terms of it. The inference most strongly suggested is that a valuable building was spoken of, be-

cause there was the covenant to insure buildings for \$4,000; and, in the ordinary mode of insurance, a policy on a building would not cover machinery. It seems out of the question therefore to argue that the machines passed by contract to the plaintiff. I do not understand it to be in that view that the alleged stipulation is alluded to, and no such case is made by the bill. What I understand his Lordship to mean is, that the fact of a stipulation having been made to place machinery on the premises which would enhance their value as security under the mortgage, is evidence that the intention in putting on the premises the machinery now in question was to improve the value of the premises, and therefore evidence that these machines were fixtures. I do not see my way to give much force to any such consideration. The absence of any definite agreement or promise or representation pointing to the addition of value by means of machinery, even if there was the like respecting a proposed building, is a serious obstacle in my way; and the fact that a structure of so little value was built rather negatives the idea that the mortgagors had the fulfilment of any such promise in view. If we can suppose them to have been influenced in erecting the wooden house or shed, instead of a stone building, by the design to put as little value as possible in the power of the mortgagees, the same design would lead to the intention to have no machines annexed to the realty, but only to have such as they could at any time remove as chattels.

The learned Chancellor, in his judgment in this case, follows his decision in *McDonald v. Weeks*, 8 Gr. 297, pronounced in 1860. Speaking of that decision, he says: "In that I repudiated the distinction between chattels fixed by nails, screws, or anything of the like, and chattels secured by their own weight. I gave my reasons at length, and I will say now that it does appear to me absurd that there should be such a distinction as that, because if an article stands by its own weight it would be mere folly for a man in addition to that to screw it down. He screws some

down and nails them because they require it, but his intention is the same whether fixed in that way or standing by its own weight."

I find it impossible to follow the discussion of the question, as it has arisen in a very large number of cases, whether certain articles are or are not fixtures, with any confidence in my ability to discover a principle that will satisfactorily apply to all cases. The distinctions made are sometimes so fine as not to be easily perceptible, and I am inclined to think that the task to bring all the decisions into harmony would be a hopeless one. I agree with the learned Chancellor, not perhaps in the proposition I have just quoted in its full breadth, but certainly in feeling that the circumstance of annexation by screws or nails affords a very unsatisfactory test. In the case of machinery, it must often happen that the more important machine stands by its own weight and requires no securing, just because it is massive, while the insignificance of another, or its trifling weight, is the reason why it must be fastened. This, however, seems to me scarcely to advance the matter much. A machine screwed down may be the same as a machine that requires no such fastening; that is to say, they may both be fixtures, or they may both be chattels; the question which are they remains. So the intention respecting the one may be precisely the same as the intention respecting the other; but whatever legal effect may be ascribed to what is done, I imagine there is seldom, if ever, a conscious design in fastening the light machine or in leaving the heavy one to stand by itself, beyond the exigencies of the machines themselves, or any contemplation of whether a fixture is being annexed or only a chattel settled in its place.

Since the decision of *McDonald v. Weeks*, the law has undergone discussion in several important cases, and although no new principles have been established, the rules by which the test may be applied have been better expounded and the principles deducible from earlier cases more satisfactorily explained. The judgment of the

Court of Exchequer Chamber, delivered by Lord Blackburn in *Holland v. Hodgson*, L. R. 7 C. P. 333, in 1872, to which my brother Burton has referred, may now be safely accepted as containing a full and authoritative summary of the law of England as settled by the judgments of all the Courts, and it may be usefully extracted at greater length. He said, at p. 333: "Since the decision of this Court in *Climie v. Wood*, L. R. 4 Ex. 328, it must be considered as settled law (except perhaps in the House of Lords) that what are commonly known as trade or tenant's fixtures form part of the land, and pass by a conveyance of it; and that though if the person who erected those fixtures was a tenant with a limited interest in the land, he has a right, as against the freeholder, to sever the fixtures from the land, yet if he be a mortgagor in fee he has no such right as against his mortgagee. Trade and tenant's fixtures are, in the judgment in that case, accurately defined as things which are annexed to the land for the purposes of trade or of domestic convenience or ornament in so permanent a manner as to become part of the land, and yet the tenant who has erected them is entitled to remove them during his term, or it may be, within a reasonable time after its expiration." * * The present case is, therefore, really, though not in form, an appeal from the decision of the Court of Queen's Bench, in *Longbottom v. Berry*, L. R. 5 Q. B. 123, and was so argued. There is no doubt that the general maxim of the law is, that what is annexed to the land becomes part of the land; but it is very difficult, if not impossible, to say with precision what constitutes an annexation sufficient for this purpose. It is a question which must depend on the circumstances of each case, and mainly on two circumstances, as indicating the intention: the degree of annexation and the object of the annexation. When the article in question is no further attached to the land than by its own weight, it is generally to be considered a mere chattel: See *Wiltshire v. Cottrell*, 1 E. & B. 674, and the cases there cited. But even in such a case if the intention is apparent to make the articles part of

the land, they do become part of the land: See *D'Eyncourt v. Gregory*, L. R. 3 Eq. 382. Thus blocks of stone placed one on the top of another without any mortar or cement, for the purpose of forming a dry stone wall would become part of the land, though the same stones, if deposited in a builder's yard and for convenience sake stacked on the top of each other in the form of a wall, would remain chattels. On the other hand, an article may be very firmly fixed to the land, and yet the circumstances may be such as to show that it was never intended to be part of the land, and then it does not become part of the land." The illustration given for this proposition is that of an anchor holding a ship, which remains a chattel, while an anchor securing the chain of a suspension bridge would be realty. Then he proceeds to formulate the rule quoted by my brother Burton, that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to show that they were intended to be part of the land, the *onus* of shewing that they were so intended lying in those who assert that they have ceased to be chattels; and that, on the contrary, an article which is affixed to the land even slightly, is to be considered as part of the land, unless the circumstances are such as to shew that it was intended all along to continue a chattel, the *onus* lying on those who contend that it is a chattel. "This however," he remarks "only removes the difficulty one step, for it still remains a question in each case, whether the circumstances are sufficient to satisfy the *onus*."

It will be observed that prominence is given, in this judgment, to the element of intention, on which so much stress was laid in the case of *McDonald v. Weeks*, and in the decision now in review; but it will also be noticed that its importance is more strongly insisted upon when it explains the object of the annexation of the article in question, and when it may thus serve to preserve to it the character of a chattel, than when it operates to make an article not annexed a fixture. Even in the latter case, it

is explained, if the intention is apparent to make the articles part of the land, they do become part of the land. For this the case of *D'Eyncourt v. Gregory*, L. R. 3 Eq. 382, is referred to, and the illustration is given of blocks of stone built without mortar into a wall, the legal counterpart of the snake fence so often cited among ourselves, or I should say, of the rails which form the fence, because, though both stones and rails could be removed without injury to the stones or the rails, you could not remove either the wall or the fence without destroying it. *D'Eyncourt v. Gregory*, is probably the best illustration; and the class of articles held to belong to the realty, though not affixed, may be understood by the following passage from the judgment of Lord Romilly, at p. 396: "With respect to the carved kneeling figures on the staircase in the great hall, and the sculptured marble vases in the hall, they appear to me to come within the category of articles that cannot be removed. I think it does not depend on whether any cement is used for fixing these articles, or whether they rest by their own weight, but upon this—whether they are strictly and properly part of the architectural design of the hall and staircase itself, and put there as such, as distinguished from mere ornaments, to be afterwards added. There may be mansions in England on which statues may be placed in order to complete the architectural design, as distinguished from mere ornament; and when they are so placed, as, for instance, they are in the Cathedral of Milan, I should consider that they could not properly be removed, although they were fixed without cement or without brackets, and stand by their own weight alone. In such a case, they resemble the stone of a mill, which is part of the mill itself and goes to the heir-at-law."

I make this extract, because I am not aware of any case in which articles, unattached to the realty and merely standing upon it, have been held to lose their character of chattels, unless they are of the classes described; or in which a chattel such as a machine complete in itself, or

even complete as a machine, though receiving motive power by connection by a belt or pipe with some other machine, has been held to belong to the realty, merely because used in a building where a manufacture for which the machine was adapted was carried on. Decisions contrary to such a contention are numerous. Neither can I perceive that on any sound principle it can make a difference whether the building was erected for the purpose of that particular manufacture, or was once used for something else. An argument was based in *Carscallen v. Moodie*, 15 U. C. R. 304 on the circumstance that the building which contained the machines, which in that case were held to be chattels, had once been occupied for a different purpose; but in my judgment that argument was unnecessary to justify the decision; and, with deference, I venture to think it was rather a feeble one.

Among the cases decided before *Holland v. Hodgson*, L. R. 7 C. P. 328, are several in which the reasons for holding articles to have become fixtures, which were yet decided to be chattels, would seem stronger than those in the case before us. Such for example, as *Wiltshear v. Cottrell*, 1 E. & B. 674, referred to in that judgment. And in our own Courts there are cases of the class of *Carscallen v. Moodie*, in the Queen's Bench, and *Schreiber v. Malcolm*, 8 Gr. 433, decided by Esten, V. C., about the same time as *McDonald v. Weeks*, and *Crawford v. Findlay*, 18 Gr. 51, in which Strong, V. C., with some hesitation held machines fastened with cleats to be fixtures. I do not intend to occupy time by referring to the particulars of those cases, as they have been so frequently discussed. I shall content myself with alluding to one or two later ones in which principles were laid down or acted upon which seem applicable to the present case.

In *Chidley v. Churchwardens of West Ham*, 32 L. T. N. S. 486, the facts were embodied in a special case, upon which the Court of Queen's Bench was asked to say if the articles were ratable as fixtures in the assessment of the premises to the poor rate. The premises were those of a

distillery. They contained tanks which formed the roofs of rooms and houses, boiling backs and mash tuns lying on brick piers against the walls, which formed the floors of some of the rooms and were connected by pipes to other houses, reservoirs, and other articles necessary for the process of distilling; they were all heavy and either unattached, except by the communicating pipes, to the walls or piers on which they stood, or fastened only by screws for the purpose of being steadied. Each was to be bought and sold as a separate article; and if all were removed the premises might be used for other manufacturing purposes. I take this summary from the head note. *Mutatis mutandis*, it would do for the present case, and the 45th paragraph of the case would almost literally apply. It is this: "The buildings and premises as they stand at the present time, are fitted and of more value for carrying on the business of a distillery than any other business, and they could, by removing the present machinery, vessels, and apparatus, be adapted to other manufacturing purposes." Blackburn, J., said, at p. 488: "There is no difficulty as to the rule of law on the subject, though there is considerable difficulty in applying the rule. Whatever is fixed to the realty so as to pass as landlord's fixtures on a demise of the premises must be taken to be part of the premises for the purpose of ascertaining its ratable value. The question what kind of fixtures come under this description, is treated at length in *Holland v. Hodgson*, L.R. 7 C. P. 328." He then quoted his judgment in that case, and continued: "Now, I am not prepared to say that the various articles described in the present case may not be taken into account as enhancing the value of the premises, but that question is not asked, and we are only to say whether the things are ratable. That depends, as it is stated in *Holland v. Hodgson*, on whether they are annexed to the freehold, and if they are annexed in a certain sense, with what intent they were so annexed. Applying these rules, it appears by the case that all the articles are chattels well known in the trade and sold separately, both as new and as second hand. They are

not attached to the premises except in the sense that the weight of the article keeps it steady ; and though one or two are screwed down, and some attached to pipes, which again are attached to steam engines, or to what are clearly fixtures, this alone will not make them fixtures. I thought at first that the two pumps were annexed to the freehold ; but with some hesitation I now think they are not so annexed as to come within the rule. They are bought as independent chattels, and though screwed down while used, still they can be easily unscrewed and again sold as chattels ; and as the rest of the Court clearly hold they are not annexed to the freehold, I agree with them. All the items thus are nothing more than chattels which rest and steady themselves by their own weight, or with the slight assistance of a screw, and are not fixtures, and not ratable as part of the premises." Lush, J., gave a short judgment to the same effect, and amongst other things remarked that the tanks on the roof were not fixtures ; that though it was said they formed the roof of the building, that only meant that while they were there, no other roof was required ; and that that circumstance did not make them so annexed as to cease to be chattels. Quain and Archibald, JJ., agreed.

This case strikes me as on all fours with the one before us, and as showing, what may be deduced from other cases also, that there is no tendency to hold that chattels have become fixtures, unless that is distinctly shown by the facts proved. It goes some length also in illustration of a remark I made a few minutes ago, that while there may be no difference between things slightly fastened to the realty and things kept in place by their own weight, the coincidence may be in both being chattels.

In *Cross v. Barnes*, 36 L. T. N. S. 693, Mr. Justice Manisty held a portable engine and boiler used for a temporary purpose in sinking a shaft to be realty, and therefore not seizable under *fi. fa.*, because affixed by mortar to a brick foundation, while if they had rested by their own weight, as such engines do when the nature of the place

permits it, they would have been held to be seizable, as is clear from the remarks of the learned Judge.

Meux v. Jacobs, L. R. 7 H. L. 481, affirms the rule that fixtures annexed after a mortgage vest in the mortgagee in the same way as if annexed when the mortgage was made.

In my opinion, we should act upon the law as given effect to in *Chidley's* case. I do not entertain any doubt that if that case had been decided before *McDonald v. Weeks*, which his lordship the Chancellor felt bound to follow, his decision would have been modified. At the same time, I repeat that I believe the current of authority is against treating as fixtures anything which is not in fact annexed to the realty, except in the cases such as *D'Eyncourt v. Gregory*, when the article forms as it were part of the fabric as an integral portion of the architectural design, though not actually fastened, or as in the familiar case of a mill-stone, which is an essential part of the mill. A different rule would, as it seems to me, be productive of confusion and uncertainty. In these days, when machines of all kinds and for all purposes are so numerous and so common, it would be a difficult matter to say where the line should be drawn, if the introduction into a building, erected or used for a particular manufacture or business, of a machine contrived for use in that manufacture or business, should, without more, be held to annex it to the realty so as to make it subject to an existing mortgage which merely professed to convey the land, and free it from seizure under a *fi. fa.* goods, leaving it subject only to the more tedious process of execution against lands, with all the inconvenience or impossibility of securing it from removal during the year that had to elapse before a sale could take place. If the drill or the lathe of the machinist is realty, why not the sewing machines in our clothing and boot factories, or any other machines of similar character? It may be said that the distinction is very slight, and that the same confusion may arise if the machines happen to be nailed down. I am aware that it is so. It is a conse-

quence of the artificial character of a fixture, and the thin distinctions on which the decision as to particular articles must turn. But I am averse to extending the rules to embrace things not included by the definitions which bind us. In my view the policy of the law should be the other way, and an article should not be held to have ceased to be a chattel unless attached really and not constructively to the freehold ; and I think that is the policy discernible in the cases on the subject, and especially in the later ones.

I think we should allow the appeal, with costs.

BLAKE, V. C.—I have had the advantage of reading the judgment of Mr. Justice Burton in this case, and concur in the conclusion at which he has arrived. There is no evidence to shew that the mortgagor agreed with the mortgagee to place the machinery in question or any other machinery on the premises mortgaged. He did not affix it, and there is no evidence of his intention to make it a permanent addition to the freehold. I am not aware of any authority for the proposition that machinery, deposited after the mortgage in a house on the land mortgaged, is covered by a mortgage of the realty. The intention of the owner of the premises must be shewn in some manner in order that what primarily are chattels may become fixtures and thus part of the realty. This is sometimes shewn by the affixing of the articles, at other times in other ways the intention is expressed, but unless by some means this is done, the articles do not lose their quality of chattels. Any such evidence is wanting in this case, and I therefore think the appeal should be allowed. As the defendant did not answer the original bill, but only put in his defence to the amended bill and as to matters in respect of which he has succeeded, he is entitled to his costs of the suit, including the costs of the appeal, to be paid to him by the plaintiff.

MORRISON, J. A., concurred.

Appeal allowed.

EARLS V. MCALPINE.

Will—Construction of—Restraint on alienation—Devise on condition.

The testator directed that his wife should have the use and control of all his property real and personal until his two sons W. & H. should come of age or until the said property is disposed of as hereinafter mentioned. He devised to each of these sons one-half of his farm, to be possessed by them when respectively of the full age of twenty-one. He then gave to his five daughters certain pecuniary legacies to be paid by each of his said sons within specified periods after their possessing the property, and directed them to give his wife a comfortable support, or £10 each annually during her life; and the will then proceeded: "I also will and direct that my above named sons W. & H. do not sell or transfer the said property without the written consent of my said wife during her life." The will was registered. After attaining twenty-one, H. mortgaged his share, without his mother's consent, to the defendants C. & M., who sold on default in the mortgage to the defendant O., who purchased as trustee for M., with full knowledge of the state of the title. Upon a bill filed by the heirs-at-law,

Held, affirming the decree of BLAKE, V. C., that the restriction upon alienation was valid, and was a condition, the breach of which worked a forfeiture, but that the heirs took the land in question charged with payment of the annuity and the legacies.

The question whether the mortgage was necessarily a breach of the condition was raised in the argument, but not in the answer, and was not decided.

APPEAL from the judgment of Blake, V. C., reported 27 Gr. 161.

The bill in this case was filed by Jane Earls and Mary Grey, two daughters of Henry Armstrong, who died in 1853, seized in fee of the south half of lot 19 in the second concession of Ops, and leaving a will the construction of which was the main question in the case, against the other children of the testator, William Armstrong, Ann Workman and Henry Armstrong, his Widow Eleanor Armstrong, and three other persons, McAlpine, Orde, and Crawford, who were alleged to claim an interest in the land under a mortgage made by Henry Armstrong, one of the sons of the testator, to Crawford and McAlpine. It asked for a declaration that Henry had forfeited his title under the will of his father, and that Crawford and McAlpine were only entitled to the share of Henry as one of the heirs-at-law of his father; and for a partition.

The will was dated 30th January 1852 and was duly registered, after the death of the testator, in April, 1853. It read as follows :

"I, Henry Armstrong, considering the uncertainty of this mortal life, and being of sound mind and memory, blessed be Almighty God for the same, do make and publish this, my last Will and Testament, in manner and form following, that is to say :

1st. I will that all my lawful debts be paid. 2nd. I will that my wife, Eleanor Armstrong, do have the use and control of all my property, real and personal, until my two sons, William and Henry, are of the full age of twenty-one years, or until the said property is disposed of as hereinafter mentioned, that is to say : 3rd. I give and bequeath to my eldest son, William, the north half of my farm, being the south half of lot number nineteen, in the second concession of the said Township of Ops, to be possessed by him when of the full age of twenty-one. 4th. I will and bequeath to my eldest daughter, Jane, the sum of twenty pounds, to be paid by my said son William, one year after his possessing said property. 5th. I will and bequeath to my second daughter, Mary, the sum of twenty pounds, to be paid by my said son William two years after possessing said property. 6th. I give or will and bequeath to my third daughter, Sarah, the sum of twenty pounds, to be paid by my said son William, four years after possessing said property. 7th. I will and bequeath to my second son, Henry, the south half of said farm, to be possessed by him when of the full age of twenty-one years.. 8th. I will and bequeath to my fourth daughter, Anne, the sum of twenty pounds, to be paid by my son Henry one year after possessing said property. 9th. I will and bequeath to my youngest daughter, Eleanor, the sum of twenty pounds, to be paid by my said son Henry two years after possessing said property. Also, my two sons, Henry and William, above named, give to my beloved wife a comfortable support, or the sum of ten pounds each annually, during her natural life, said support or annuity to commence at the

time my said youngest son, Henry, possesses his share of the property.

I also will that my above-named sons, William and Henry, do not sell or transfer the said property without the written consent of my beloved wife, Eleanor, during her life. I further appoint as executors to this my last will and testament John Graham and Thomas Ray, both of the township of Ops, farmers, in the county of Victoria aforesaid. In witness whereof," &c.

Henry mortgaged his share of the land to Crawford and McAlpine without the knowledge or consent of the widow. It was alleged in the bill that Henry having made default, MacAlpine caused the land to be sold, and Orde became the purchaser with full knowledge of the state of the title; and it was also alleged, and was admitted by the answer of MacAlpine, Orde, and Crawford, that Orde purchased as trustee for MacAlpine. There was nothing to show how the land was sold, whether under deed, power of sale, or *fi. fa.* The result merely appeared that under Henry's mortgage MacAlpine had become seized absolutely of whatever passed by the mortgage.

The contention of the plaintiffs was, that the clause restricting the sale or transfer of the property without the written consent of the widow during her life was a condition the violation of which by Henry annulled the devise of the south half of the farm, and caused it to vest in the heirs-at-law.

That view was acceded to by the learned Vice Chancellor Blake in the Court below, and the present appeal from that decision was brought by McAlpine, Orde, and Crawford.

The case was argued on the 4th May, 1880 (a).

Blake, Q.C., and Bethune, Q.C., for the appellant.

O'Leary for the respondent.

The arguments of counsel and cases cited sufficiently appear in the judgments.

(a) *Present*.—BURTON, PATTERSON, and MORRISON, JJ.A., and ARMOUR, J.

March 1, 1881. BURTON, J. A.—The plaintiffs in this case claim to be entitled as heirs-at-law of their father, Henry Armstrong, to a proportionate share of certain lands in the township of Ops, which were devised by him to his son Henry Armstrong the younger, claiming that the son had forfeited his title to the same under the will, by reason of his having made certain mortgages thereon without the consent of his widow, and praying for a declaration of such forfeiture, and a partition among the parties interested.

The testator, Henry Armstrong, by his will dated the 30th January, 1852, after providing for the payment of his debts, wills that his wife, Eleanor, do have the use and control of all his property, real and personal, until his two sons William and Henry are of the full age of twenty-one years, or until the said property is disposed of as hereinafter mentioned, that is to say, and then follows this clause: 3rd, I give and bequeath to my eldest son, William, the north half of my farm, to be possessed by him when of the full age of twenty-one years. Then to his daughters Jane, Mary, and Sarah, he gives certain pecuniary legacies, to be paid by William, one two and three years respectively, after his possessing the property.

To his son Henry he gives the south half of the farm to be possessed by him when of the full age of twenty-one years. To his daughters Annie and Eleanor he also gives pecuniary legacies to be paid by Henry, one and two years respectively after possessing the property.

He then directs that his two sons above named give to his wife a comfortable support, or the sum of £10 each annually during her natural life, said support or annuity to commence at the time my said youngest son Henry possesses his share. And then comes the clause under which the question in this case has arisen, which is in these words: "I also will that my above named sons William and Henry do not sell or transfer the said property without the written consent of my said beloved wife Eleanor, during her life."

The question is, whether by the terms of the will a con-

dition is annexed to the devise to each of the two sons, and whether that condition is such that a non-compliance with it, either by a sale or transfer of his portion, operates to work a forfeiture, and divest the estate.

I agree with the learned Vice Chancellor that if the terms used here amount to a condition, it is not open to the objection of being void as a restriction inconsistent with, and repugnant to, the estate previously granted.

I do not understand that the case of *Renaud v. Tourangeau*, L. R. 2 P. C. 4, in the Privy Council, establishes any thing more than this, (a principle with which we are all familiar,) that an attempt on the part of the testator to protect an estate in fee from liability to the debts and contracts of the owner is inoperative and void—in that case the devisee himself having attempted to set up the condition with a view to defeat his creditors; but the authorities seem to show that where there is but a limited restriction upon alienation the rule has always been to consider it as not repugnant to the estate granted, and therefore valid.

The doubt I have felt has been whether it could be regarded in the light of a common law condition. It was contended upon the argument that so to hold would be to defeat the intention of the testator, and that the effect of the forfeiture would be to create an intestacy and a lapse of the legacies.

The cases however which are referred to by my brother Patterson in his judgment, clearly establish that when land is devised to one with a direction to the devisee to pay a sum of money annually, or in gross to another, the charge is not affected by the lapse of the devise of the operated property, but the heirs will take the property charged with the annuity or legacy in question.

Had it been otherwise, there would have been much force in the argument, as it could scarcely be supposed that the testator intended to create a forfeiture, the effect of which would be to defeat the payment of the legacies and the allowance to his widow.

There is no doubt that the tendency of modern decisions has been in all cases, where practicable, to construe what under the old law would be a devise upon condition as a devise in fee upon trust, and that by this construction, instead of the heir taking advantage of the condition, the *cestui que trust* could compel the observance of the trust by a suit in equity. So in the present case, if the sole question had arisen in reference to a devise subject to the payment of pecuniary legacies, it would be more in accordance with that rule of decision to have treated this matter as a trust enforceable in equity, but here the testator directs that the widow shall receive a comfortable support out of the farm, followed by a direction that the parties to whom it is devised are not to sell without the written consent of the widow. In such a case, or in the supposable case of a devise simply to the sons, followed by such a direction, are we at liberty to speculate as to the intention of the testator, and to say that no effect is to be given to the plain words which he has chosen to annex to the gift?

Contrary, I am free to say, to the impression I formed on the argument and for some time subsequently, I have come to the conclusion that the words here created a condition valid in law, and for breach of which the heirs are entitled to enter.

I think therefore that the appeal should be dismissed, with costs.

PATTERSON, J. A.—The Vice Chancellor stated (27 Gr. 164) that he considered it reasonably clear, upon the authorities, that a condition not to alien to a particular person or for a particular time is good; and also that where the condition could be traced not to the mere whim of the testator, but to the desire to secure a legacy or benefit a beneficiary under the will, there the Court would sustain the condition for any such purpose inserted in the will; and he referred to the cases of *Daniel v. Ubley*, Sir W. Jones, R. 137; *Doe v. Pearson*, 6 East 173 and *In re Macleay*, L. R. 20 Eq. 186 as sustaining that view; and to the

cases of *Attwater v. Attwater*, 18 Beav. 330, and *Gallinger v. Farlinger*, 6 C.P. 512, and *Renaud v. Tourangeau*, L. R. 2 P. C. 4, as not making it necessary to hold otherwise, although they might seem to restrict the power of alienation as permitted by the earlier cases.

In my opinion the rule of law is correctly laid down by the learned Vice Chancellor. I think he is fully sustained alike by principle and authority. I do not regard the three cases which he seemed to think might tend towards a different ruling, as really having that effect. *Attwater v. Attwater* which was decided in 1853 by Sir John Romilly, Master of the Rolls, was discussed by Sir George Jessel, the present Master of the Rolls, in giving judgment in 1875, in *re Macleay*, L. R. 20 Eq. 186, and was shewn not to be in conflict, in any matter of principle, with the decision he was then pronouncing. *Gallinger v. Farlinger*, in which our Court of Common Pleas relied to some extent upon the authority of *Attwater v. Attwater*, was not really open to the questions which in that case required such an explanation as they received in *re Macleay*. The devise in *Gallinger v. Farlinger* was "to my said sons Michael Henry and George, their heirs and assigns for ever, in fee simple and in joint tenancy;" words which, under the most rigid rule of the common law, made them joint tenants in fee. The restriction was, that they should "not be at liberty to sell any part of my homestead farm herein wiled, except to each other, and so descend to their heirs to the third generation;" which was manifestly repugnant to the estate devised.

Renaud v. Tourangeau, being a decision of the ultimate Court of Appeal in Colonial cases, is doubtless binding authority upon us in whatever it decides. But it does not in truth touch the question we have to deal with. The will there declared that the devisees should not in any manner incumber, affect, mortgage, sell, exchange, or otherwise alienate the immoveables being on their respective lots, until the period of twenty years from

the testator's death. One of the devisees confessed judgment for a debt; and when the creditor seized some of his immoveables, under a *fi. fa.* upon the judgment entered up on his cognovit, he brought the action to assert the immunity of his property from seizure under the execution against him. The will, after declaring the prohibition I have quoted, had added the words "under penalty of the nullity of all acts which they shall do contrary to my intention." It was held that such a restriction as was made by the testator, Mr. Tourangeau, in his will was not valid, either by the old law of France or by the general principles of jurisprudence. It might I think have been added, upon the principles acted upon in *Croft v. Lumley* 5 E. & B. 680, 6 H. L. C. 672, that the giving of the cognovit was not within the terms of the restriction. But there is a broad distinction between that case and others of the class embraced by the rule enunciated by the Vice Chancellor, in the fact that there was there no question of the forfeiture by the devisee. It was his attempt to retain the property devised as against his execution creditor. While therefore we may concur, as was done by the judicial committee, in the reasons stated in the very able judgment of Mr. Justice Meredith, delivered in the Court of Queen's Bench in Lower Canada, we may adopt them only as applicable to the state of facts with which he was dealing; and it is unnecessary to follow his argument touching the French law on the subject of *substitutions*.

The question which has occasioned most difficulty with me is not whether the law respecting the effect of a condition restraining alienation for a limited time has been correctly expounded, for on that I have no hesitation in affirming the judgment of the Vice Chancellor; but I have not been able to arrive, without some fluctuation of opinion, at the conclusion that this will contains a condition that comes within the rule and the violation of which works a forfeiture of the devise.

This question has been made before us, but I do not find any trace of its having been argued in the Court below; and it is not touched in the judgment delivered

Mr. Blake cited the case of *Wright v. Wilkin*, from 9 W. R. 161, as an authority for the proposition that what would once have been held to be a condition will now be held as merely creating a trust. The case does show that such a modification of ancient rules of construction had been admitted in Courts of law, as a consequence of these tribunals having come, even before recent legislative changes, to recognise, as part of the law of the land, the doctrines of equity which in old times they used to ignore. On this point the case is not of much importance to us at present. There would be no difficulty in holding that a devise to Henry Armstrong, on condition that he should pay his mother an annuity, would create merely a trust in her favour which she could enforce, and the nonperformance of which would give no right to the heir to enter. That is the extent to which *Wright v. Wilkin* would, by force of the direct decision, govern the present case. The condition we have to deal with is of a different character. Still, the hesitation I have had has been chiefly due to the perusal of the judgments delivered in *Wright v. Wilkin*, in the Queen's Bench and Exchequer Chamber, as reported in 2 B. & S. 232. In that case the testatrix had bequeathed a number of legacies, and then devised and bequeathed her estate real and personal to Wilkin, *on condition* that in the event (which happened) of the personal estate proving insufficient for the payment of the legacies, he should pay them within twelve months after her decease. The action was ejectment by the heir-at-law in assertion of a forfeiture for non-payment of the legacies within the twelve months. The testatrix had, by an express declaration, charged her estate real and personal with the payment of the legacies. It was nevertheless held, in the Queen's Bench, that this was only a charge on the land in the hands of the devisee or those taking under him, and would not be a charge in the hands of the heir; wherefore, to hold the land forfeited, would be to frustrate the intention of the testatrix. In the Exchequer Chamber, where the decision was upheld, this reason is not discussed in the

judgments, which are put generally on the ground that the will did not disclose any intention that the heir should take the land. The decision was that a trust was created, and not a condition imposed for breach of which the heir could enter.

In the case before us the argument has been pressed that the heirs, taking for breach of the condition against alienation in the widow's life time, would take the land freed from the charge in her favour, which would attach to it in the hands of Henry or of his assigns; and that so the leading object of the testator, which was to secure to the widow the benefit intended for her, would be defeated.

If this result should follow from our holding the restrictive clause to impose a condition, it would unquestionably be our duty to treat it merely as an expression of the testator's desire, which he relied upon his sons to respect, but to which he did not intend to attach the force of a condition. The language of the judgments in *Wright v. Wilkin* seemed to me to lead in that direction; but I now think we should regard that decision as having proceeded upon the intention, which the will was taken to manifest, that the devisee should retain the lands for the purpose of providing for the legacies, the express charge being introduced in furtherance of that intention, to make it clear that he had power to sell or incumber the lands in order to raise the money.

I think we may properly apply to the construction of this devise a rule which has guided Courts of Equity for one hundred and fifty years, in holding lands charged by words similar in effect to those with which we are dealing; and I think the whole scope of this will is in accordance with that rule.

The case of *Wigg v. Wigg*, 1 Atk. 382 was decided by Lord Hardwicke in 1739. A testator devised lands to his son on condition that he or his heirs should pay legacies amounting to £90; and in default of payment there was a clause of entry and distress. The devisee died in the life time of the testator, and the heir entered on the lands

and sold them. The question was, whether, notwithstanding the failure of the devise, the land continued charged with the legacies. It was held that, the purchaser having taken with notice, the charge continued. The general doctrine is thus put by Lord Hardwicke: "A. devises land to B. on condition to pay C. a sum of money, and no clause of entry; this is no charge on the estate to give the legatee of the money a lien on the lands, but the *heir-at-law* shall enter and take advantage of the breach of the condition; and yet in this court he shall be considered only a trustee for the legatee." In a similar case, *Hills v. Wirley*, 2 Atk. 606, the same Lord Chancellor states the rule in these terms: "the essential rule in all these cases is, that as long as the fund itself exists upon which the legacy is charged, though it devolves either upon the heir or the executor, yet they take it subject to the charge."

Oke v. Heath, 1 Ves. Senr. 135, also before Lord Hardwicke, is a strong case of the same kind. There a person had by will appointed £4000 to be paid to her nephew for his own use and benefit; but, in consideration thereof, he to pay to his mother an annuity of £100 and to enter into a bond with a penalty for payment thereof. The nephew died before the testatrix. Cross bills were filed, one by the father of the appointee, who represented him and also claimed arrears of his wife's annuity; the other by Heath and his wife who was the residuary devisee. Lord Hardwicke said, at p. 141: "As to the arrears of the annuity of £100 directed to be paid to the mother of the appointee, by his death in the life of the testatrix it is said to become void, and nothing but a gift on condition, and not a direction to pay out of that sum. But I am of opinion that it amounts to the same, from the words *in consideration thereof*, as was held by me in the case cited; and in all these cases they are considered as charges on the estate, notwithstanding the bond; that being only the future care of the testatrix to secure it."

Then looking at this will, we find the testator giving to his wife the control and use of all his estate real and

personal, until his sons are of full age, or until the property is disposed of "*as hereinafter mentioned, that is to say:*"

Then he proceeds to devise one half of the farm to William, subject to the payment of £20 each to three of his daughters, and the other half to Henry charged with £20 each for two other daughters: each son to have possession of his land when of age. Then follows the provision for the wife's support, or money payment in lieu of it. By support, he means support on the farm, as is evident not only from the option given to pay money, but from what we know of the way these things are thought of and spoken of among the farming community. The property is thus "*disposed of.*" Wife, sons, and daughters all share in it. The wife controls the whole, not precisely till both sons are of age, as it is worded in the will, but till William, the eldest son, comes of age; then she controls Henry's half till Henry is of age; thenceforward she is to have a comfortable support upon the farm, unless the sons exercise the option of paying her the annuity; and with some idea, although without any strict legal necessity, of better securing her provision, or perhaps merely with the idea of making things more pleasant for her, he annexes the condition against parting with the land in her lifetime without her written consent. It does not appear to me to strain the language of this will, taken altogether, to hold that the provision for the wife is part of the disposition the testator declares his intention to make of the land, and that therefore, by the direct force of the instrument, as well as by the rule established by the cases I have referred to, the charge is fixed upon the land.

We shall in this view do nothing to disappoint the testator's intentions to secure the benefit given to the wife, by enforcing the forfeiture as against Henry and the defendants, who took with notice of the restriction upon his power to convey.

It was suggested in argument that the making of a mortgage was not necessarily a breach of the condition which only prohibited a sale or transfer. It is possible

with a full knowledge of facts, and in a proper case, and applying as against a forfeiture a strict rule of construction, a contention of that kind might be supported. In his remarks *In re McLeay*, the Master of Rolls certainly speaks of a mortgage as not necessarily forbidden by a condition not to sell. We are, however, hearing this case on bill and answer only. We do not know how the sale took place. It may have been under a power given by the devisee, which would probably be found much the same thing as a sale by himself; and then there is the word "transfer" as well as the word "sell." The defendants raise no such question in their answer. They say nothing to define or explain the general statement of the bill; but boldly take the stand that the assigns of Henry are entitled to hold the land, only charged with the annuity.

I agree that we cannot accede to that contention, and that we should therefore dismiss the appeal, with costs.

MORRISON, J. A., and ARMOUR, J., concurred.

Appeal dismissed.

KILBOURN V. ARNOLD.

Foreclosure—Fiduciary relations between mortgagor and mortgagee.

In a foreclosure suit the defendant alleged that the plaintiff, a solicitor, had been employed by him in April, 1878, to procure a loan of \$1,400, which he required to pay off a mortgage for \$2,000, on which there was due \$2,120, and that taking advantage of the information so acquired, the plaintiff had purchased the mortgage for himself at the price of \$1,400. It appeared that the defendant had, in the spring of 1877, obtained a loan of \$600 on a portion of the land in question, through the plaintiff acting as agent and legal adviser of a Loan Company: that in January following, the defendant had applied to the plaintiff, acting in the same capacity, to procure a small loan from the company on the land in question, which the plaintiff told him he could not recommend to the company: that afterwards one B., who held the \$2,000 mortgage, tried to sell it to the company through the plaintiff, who, finding that the land comprised in it did not come up to the value required by the company, wrote B. to that effect, and subsequently the plaintiff, who denied that the defendant had ever requested him to obtain the \$1,400 loan, purchased the mortgage for himself for \$1,625.

Held, reversing the decree of BLAKE, V. C., 27 Gr. 429, that the evidence which is fully set out below, shewed that the defendant had not applied to the plaintiff for the \$1,400 loan, and that there was no confidential or fiduciary relationship existing between the parties which precluded the plaintiff from purchasing the mortgage.

APPEAL from the decree of Blake, V. C., reported 27 Gr. 429.

The question in this case arose in a foreclosure suit upon a mortgage, given by the defendant to one Bricker, to secure the purchase money of 100 acres of land, which the defendant in 1877 purchased from him.

The plaintiff was the assignee of the mortgage by assignment from Bricker; and the defendant set up in his answer that in the previous year he, being the owner of the adjoining 200 acres had, through the instrumentality of the plaintiff, who acted for him, and as his agent, obtained from the London Canadian Loan and Agency Company a loan upon it of \$600: that shortly afterwards he became the purchaser of the 100 acres, for which he was to pay \$2000, (as the evidence shewed, on a long term of credit) and on the completion of the purchase he executed the mortgage now in question, which included not only the land recently purchased, but the 200 acres already mortgaged: that sometime in or about the month of March or April,

1878, there being then due to the said Samuel Bricker on his mortgage to him, for principal and interest, about \$2,120, the said Samuel Bricker, through his son D. O. Bricker, acting as his agent, offered to accept from him in full payment of the same, the sum of \$1,400: that with the view of enabling him to take advantage of this offer, he applied to the above named plaintiff and authorized him to obtain for him a further loan on the said three hundred acres, informing the plaintiff at the same time of the offer made to him by the said Samuel Bricker, which the said plaintiff then promised he would endeavour to do: that about a week after making application to the above-named plaintiff to obtain for him as his agent the required loan, he again called upon the plaintiff with reference to the same, at the same time applying to him to also obtain sufficient money in addition to the amount required to buy or pay off Samuel Bricker's mortgage, a small additional sum to enable him to buy seed grain for the next spring planting; in answer to which the plaintiff advised him to obtain what money he required for the purchase of seed grain from some other source, not leading him, however, to infer that there would be any difficulty in obtaining the sum of \$1,400, wherewith to pay off the said \$2,000 mortgage: that subsequently, and some time in the following month of May, the plaintiff called upon him, and stated that he would like to go over the mortgaged premises with the view of enabling him to form a more accurate estimate of the value of the same: that supposing that the plaintiff's expressed wish to go over the farm was with the view of obtaining the said loan for him, he conducted him over the different portions of the said three hundred acre farm, pointing out the valuable nature of the same: that the plaintiff, instead of borrowing the said money to enable him to pay off the mortgage, as he had authorized him to do, proceeded without his knowledge or consent to purchase the mortgage from Samuel Bricker in his own name; and that the plaintiff obtained an assignment of the said mortgage to himself in his own name, as

the absolute owner of the same, by an instrument in writing, bearing date, as appeared by the plaintiff's bill, the 8th day of July, 1878: that he was informed and believed that the plaintiff obtained the assignment of the mortgage upon payment of about the sum which the mortgagee, Samuel Bricker, had as aforesaid agreed to accept from him for the same, that is to say \$1400.

The case came on for the examination of witnesses and hearing at the Sittings of the Court at Owen's Sound, in June, 1880, before Blake, V. C., who held upon the evidence, which is set out in the judgment of Burton, J. A., that the relation of legal adviser and client had been created between the plaintiff and the defendant, and that therefore the plaintiff could only recover the amount advanced by him on receiving the assignment of the security to himself with interest, thereon from the date of his purchase, reported 27 Gr. 429.

The plaintiff appealed.

The case was argued on the 18th January, 1881.

Robinson, Q. C., and *W. Cassels*, for the appellant, argued that it was perfectly clear from a review of the whole case from its inception to the assignment of the mortgage, that there was no relationship of solicitor and client existing between the appellant and respondent, and equally clear that there was an absence of any confidential relationship. Such being the case the appellant had an undoubted right to purchase the mortgage. They cited *McLennan v. McDonald*, 14 Gr. 65; *McCann v. Dempsey*, 6 Gr. 192; *Edwards v. Meyrick*, 2 Ha. 70; *Rider v. Jones*, 2 Y. & C. 498; *Johnson v. Fesemeyer*, 3 DeG. & J. 22.

Bethune, Q. C., and *D. A. MacIntyre*, for the respondent. The learned Vice Chancellor, before whom this case was tried, found as a fact that the appellant stood in a confidential and fiduciary relation towards the respondent in reference to the transaction in question, which disabled the former from purchasing the mortgage; and this finding,

(a) *Present*.—BURTON, PATTERSON, and MORRISON, JJ.A., and PROUD-FOOT, V.C.

which is amply sustained by the evidence, should not be disturbed. They cited *Hobday v. Peters*, 28 Beav. 349; *Billage v. Southee*, 9 Ha. 534; *Holmes v. Lyons*, 4 L. J. Chy. 209; *Waters v. Thorn*, 22 Beav. 549; *Bayly v. Wilkins*, 3 J. & La T. 635; *Rhodes v. Bate*, L. R. 1 Ch. 252; *Tate v. Williamson*, L. R. 2 Ch. 55; *Davis v. Hawke*, 4 Gr. 395.

March 1, 1881. BURTON, J. A.—If the allegations contained in the answer are sustained by the evidence, there can be no question of the correctness of the decree made by the learned Vice Chancellor. The only point for consideration is, whether they are borne out by the evidence, or if not to the full extent, whether it is established that the plaintiff at the time he purchased the mortgage stood in such a confidential and fiduciary relation to the defendant as disabled him from purchasing it for his own benefit.

According to the defendant's evidence (taken before the special examiner previous to the hearing), he made no application to the plaintiff until the month of April, 1878: he had a few days previously called upon Bricker in reference to the instalment then about maturing on the mortgage, and Bricker had then proposed to accept \$1400 in full: he then applied to the plaintiff for a loan of \$1600 to pay off this mortgage and for the purchase of seed grain, and the plaintiff told him there was no use in trying to get it; and he understood he was at liberty to try and get the money somewhere else: and that he could not get it through the plaintiff: and he never went back to the plaintiff, as he understood that he did not intend to do any thing about it when he left.

In his examination at the hearing, although the matter is left in great obscurity, I gather that the defendant made two visits to Bricker, but it was on the second of these visits, about the time the instalment was falling due, that Bricker suggested he should buy up his mortgage, and a few days after this that he saw the plaintiff.

Now assuming this version of the transaction to be cor-

rect, it entirely disproves the case set up by the defendant, that the plaintiff entered into negotiations with Bricker for the purchase of the mortgage after the defendant had informed him of Bricker's offer.

It is apparent that the plaintiff did not originate the negotiations for the purchase at all, but that some two months before the alleged interview between the defendant and the plaintiff, Bricker had written to the plaintiff suggesting that it would be well for the London and Canadian Loan Company to buy it, and requesting him to ascertain the best the company would do.

The plaintiff took no action upon that letter, and it was not until the 4th of April that he again received a letter from Bricker, having accidentally met him in Port Elgin in the interval. In that letter Bricker inclosed the mortgage, and pressed him to ascertain, as soon as possible, what the company would give, and not until the 17th of April did the plaintiff apparently take any steps to bring the matter before his company.

He then asks them to consider whether they would be willing to take it at \$1782, as if so he would inspect it.

It will be seen that up to this time there was no negotiation by the plaintiff to purchase on his own account at all, but he was acting at the instigation of Bricker in ascertaining whether the company would entertain the purchase, and it must be clear to any one reading the correspondence that up to that time he could have heard nothing of the offer of Bricker to accept \$1400, or he would not have written to the company that they could get it for \$1782; and I think it equally clear that he did not subsequently hear of it, or when bargaining with Bricker on his own account he would not have entered into calculations to induce him to reduce the amount or haggled about \$50, but would naturally have said, You have already made an offer to sell it for \$1400, and I am not willing to give more.

If the defendant's statement be reliable, he mentioned this to the plaintiff very early in April.

Several letters were received from Bricker pressing for

an answer as to the intention of the company. The company said they could give no reply until they received a report of the value of the land, and the plaintiff did inspect the property about the 26th or 27th of May, and then finding that it did not come up to the value required by the company's regulations he wrote to Bricker to that effect, and then for the first time, apparently, conceived the notion of purchasing on his own account, and enquired if \$1600 would purchase it. They reply offering to take \$1700. He then stated that the company would not take it, as the security did not afford the required margin, and that he would take it at the price previously named. After some further negotiations the sale was, on the 5th of July, closed at \$1625.

Now it is inconceivable that the plaintiff would have given this sum, if there was any truth in the defendant's statement that he had informed him of Bricker's willingness to sell at \$1400.

But the plaintiff's statement is in direct opposition to this, and is very strongly confirmed by the letters which were written at the time. He denies that the defendant ever informed him that he could obtain the mortgage for \$1400, or that he applied to him for a loan to enable him to pay it, but he says he did, in January 1878, apply for a loan of \$200, intimating that he had seen Bricker, who was willing to postpone his mortgage to enable him to do so, and plaintiff's letter of the 15th January was written simply with the object of ascertaining if he might rely upon that before sending in his application to the company.

He states further, that when he inspected the property he informed the defendant that he was doing so in order to report to the company, to whom Bricker was endeavouring to sell it, and that before completing his purchase he adopted the ordinary and prudent precaution of procuring from the mortgagor a certificate, under his hand, of the amount due upon it; and although the defendant now pretends that that memorandum was not read over to him, he admits that he was then told that the plaintiff had contracted for

the purchase, and was then on his way to Owen Sound to complete it and he uttered not a word of remonstrance, nor made any enquiry as to the sum paid.

I am unable, I must confess, even upon the defendant's own evidence to discover what confidential or fiduciary relationship existed between these parties, which would render the plaintiff incompetent to make the purchase for his own benefit.

The plaintiff does not appear to have known the defendant until he applied to him for the loan of \$600. In that matter, the plaintiff to my mind was clearly acting as the agent of the company, and not of the defendant, although in my opinion it would make no difference if in that transaction he had been employed as the solicitor of the defendant.

In the proposed loan for the \$200 he was also acting for the company, and applied for information to Mr. Bricker, so as to be satisfied that he could properly send in the application; but even if he were acting as solicitor in that matter, I am unable to see how that disabled him from purchasing the mortgage, which was not the business and had no necessary connection with the business about which he was retained.

If it were established that he had been informed by the defendant of the offer made by Bricker to him of the security, and had undertaken to endeavour to raise the money for him to make that purchase, it might be questionable whether he would have been in a position to purchase for his own benefit until a reasonable time had elapsed after he had fully advised his client that his efforts had failed, and that he must trust to his own exertions to raise the money.

Here, taking the view most favourable for the defendant, the plaintiff told him from the first that he did not think it possible to raise the money, and immediately afterwards that he could not do it.

To entitle the defendant to succeed, it was, I think, incumbent upon him to show that he refrained from using any efforts to raise the money, relying on some confidence

reposed in the plaintiff. If the plaintiff, for instance, having obtained information from the defendant, as his client, that this mortgage could be obtained at a bargain, had deluded him with promises of assistance, and had availed himself of that information to purchase it for his own benefit, I could well understand the Court interfering to prevent his retaining it, but the mere circumstance that the defendant had applied to an attorney for a loan, to enable him to make the purchase, would not in itself be sufficient to disentitle the attorney to make it. Such a proceeding might be highly discreditable, but I know of no doctrine of equity which would preclude him from doing so if so disposed. The Court of Chancery is not a Court any more than a Court of Law for the enforcement of morality.

The defendant's counsel felt the necessity of establishing that the relationship of solicitor and client existed, and must have felt that his position was not a very strong one when driven to such straits as endeavouring to show that the plaintiff had advised about a trade of horses, and that 25 cents had been paid on each occasion of remitting the interest, the first not being advice of a professional character, and the latter the bank commission paid upon the draft.

The statement of the existence of fiduciary relations between them, which I extract from the answer, is to my mind equally disingenuous and exaggerated.

It is in these words:—

“The plaintiff has acted for me as my agent as aforesaid in obtaining the loan of \$600; and I have also given him several sums by way of interest on the said mortgage, with instructions to forward the same to the mortgagee; and in all these matters I have reposed great trust and confidence in the said plaintiff; and such confidence was to a considerable extent induced by the fact that I looked upon the plaintiff as a solicitor of this honourable Court.”

And the succeeding paragraph, in reference to a tender of the amount paid by the plaintiff, was false to the defendant's knowledge.

It is clear to my mind that on the occasion of the \$600 loan the plaintiff acted as the agent of the company, and not of the defendant, and that he occupied a similar position when the further loan of \$200 was applied for.

In a case turning entirely upon the credibility of the witnesses, a Judge of an appellate Court may well hesitate to set up his own opinion against that of the Judge of first instance; but this is not a case of that nature. The learned Judge has, it is true, expressed no opinion as to the relative amount of credit he attached to the statements of the parties, and if the oral evidence stood alone it might be difficult to interfere, but this case does not depend upon the mere statements of the witnesses; we have their acts at the time, which go strongly to confirm the evidence of the plaintiff, and are entirely inconsistent with that of the defendant, and the probabilities of the case are strongly in favour of the case presented by the plaintiff.

His evidence as to the application for the loan of \$200 is confirmed by his letter of the 15th January, which shows that he was about to apply to the company for it, in the event of the statement made by the defendant of Bricker's willingness to postpone his mortgage being confirmed. Bricker confirms this by showing that the defendant made application to him for \$200.

Mr. Bethune refers to the circumstance that the negotiations with the company were broken off on the 28th, and on the following day were commenced on his own account.

If the plaintiff had been negotiating for a loan from the company for the defendant, I could see the force of an argument founded upon this circumstance, but here he was acting for Bricker in endeavouring to sell to the company a security made by the defendant. The defendant was no party to that negotiation, and it was a matter of no consequence to him whether the mortgage was sold to the company or to the plaintiff. As I have already said, I believe the plaintiff's evidence as to this negotiation, both because the letters confirm it, and because it is simply incredible to

suppose that he would have been foolish enough to offer upwards of \$1600 for the mortgage if the defendant had told him that it could be obtained for \$1400, and because it is equally incredible that the defendant would have heard of the plaintiff's purchase without any enquiry as to the amount paid, or any remonstrance against his purchasing, if the plaintiff was then under any obligation to acquire it for him.

The matter has been referred to as if the mortgage had been disposed of at a large discount. I must confess that it does not strike me in that light, but that the full value was paid for a security having so many years to run. The amount large or small cannot affect the principle—but I refer to it because I think it would have been very difficult indeed for the defendant to procure so large a loan as would have been required to purchase the mortgage upon such property as this is, and the defendant's evidence shews that he could get no one to make such an advance.

But the inconsistencies in the defendant's statements tend greatly to weaken it, apart from its direct contradiction by the evidence of the plaintiff and the letters written at the time.

He states at first that he went once only to Bricker's. On that occasion he applied for the \$200, and Bricker then suggested his purchasing the mortgage. Bricker confirms this, and the plaintiff's act in writing to Bricker in reference to the loan for \$200, and that alone, agrees with it.

The suggestion of two visits, one in January, seems rather to have come from the counsel, than the witness, who is asked—"Then did you ask Bricker in that month of January about getting some more money to buy seed?" and "Well you went up afterwards and had another interview with Bricker," questions quite at variance with the defendant's own statement on the previous examination. And then comes another very suggestive question. "Did he offer to give you this mortgage?" which elicits the reply that on the second occasion he did so.

It is worthy of notice that the defendant, in answer to

the first question about the money to buy seed, states that Bricker then said that if he were to call on the plaintiff no doubt he could get some money, and this was followed by his applying to the plaintiff for the loan of \$200, and the plaintiff's letter to Bricker about it.

I feel constrained to come to the conclusion that there is no evidence, upon which a Court could safely act, to show that any confidential or fiduciary relations were established between these parties in connection with this transaction, and I must add for myself, that in my opinion the plaintiff did nothing inconsistent with a most scrupulous sense of honour and fair dealing, and that he has treated the defendant with great forbearance and generosity, for which he has received a not unusual return.

For these reasons I am of opinion that the appeal should be allowed, with costs, and the decree varied by omitting the declaration that the mortgage should stand only as security for the amount actually paid, and that the defendant should be ordered to pay the full amount due for principal and interest on the mortgage security, and the costs of suit, or in default be foreclosed.

PATTERSON and MORRISON, JJ.A., and PROUDFOOT, V. C., concurred.

Appeal allowed.

RE WALKER, AN INSOLVENT.

*Insolvent Act of 1875—Assumption of liabilities by continuing partner—
Joint and separate debts.*

Where, upon the dissolution of a firm, the business is continued by one of the partners, who assumes the liabilities, the joint assets remaining in specie are primarily applicable to the payment of the joint creditors of the firm.

Held, that under section 88 of the Insolvent Act of 1875, if the dividend is derived wholly out of joint estate, the joint creditors alone can share until fully paid; if wholly out of separate estate, it belongs entirely to separate creditors till they are paid, and if partly out of each class of assets it should be divided *pro rata* between each class of debts.

APPEAL from the decision of the Judge of the County Court of the County of York, sitting in insolvency, disallowing the contestation of the inspectors of the estate of Walker & McBride, insolvents, of the claim of Messrs. Currie & Co., the attaching creditors, to rank as collocated on the dividend sheet. The facts and the authorities cited are stated in the judgment.

The case was argued on the 8th of February, 1881, before Patterson, J.A., sitting alone in insolvency.

Mortimer Clark, for the appellant.

W. Redford Mulock, for the respondents.

March 1, 1880. PATTERSON, J. A.—The materials from which I have to gather the position of affairs, and the facts on which the contest turns, are rather scanty. Walker & McBride, who had carried on business as safe makers under the firm of John Taylor & Co. from early in 1873, took one Poole into partnership with them in January, 1876. In the following September McBride and Poole retired from the firm, and the business was continued by Walker and one Morrison till 10th February, 1877, and afterwards by Walker alone until 3rd May, 1877, when the attachment in insolvency issued. The firm was always John Taylor & Co., and the assets, which are said to have consisted to a great extent of plant and machinery, and other property capable of being speci-

fically recognized, remained in the business, Walker assuming the liabilities upon each change. Walker added other assets and contracted debts after the dissolution with McBride. Under the attachment the sheriff seized whatever there was. This appears from the examination of Walker, and also, though less distinctly, from his schedules of assets and liabilities and the affidavit which accompanied them. Mr. Mulock referred to the form of the writ, which is against Walker & McBride, and the sheriff's return, which, following the writ, states that he had seized the estate and effects of Walker & McBride, trading under the name of John Taylor & Co., as evidence that the estate and effects seized were the joint estate and effects only; but I do not understand these documents as being inconsistent with the assertion that separate effects of Walker were also seized, or as at all tending to discredit the evidence given by Walker.

The inspectors, who are the present contestants, rely on the circumstance that the whole of the estate and effects of McBride and Walker devolved upon Walker separately, as between him and McBride, the result of which they contend was to leave no joint estate, and therefore to entitle the joint creditors of Walker & McBride, and the separate creditors of Walker to rank *pari passu* upon the estate as it existed at the time of the attachment. Mr. Mortimer Clark has referred, in support of that view, to the cases of *Ex parte Hayden*, 1 Bro. C. C. 454; *Ex parte Sadler*, 15 Ves. 52; *Ex parte Bradshaw*, 1 Gl. & Jam. 99; *Ex parte Bauerman*, Dea. 479; *Ex parte Peake*, 2 Rose 54; *Ex parte Harris*, 1 Mad. 583, and *Ex parte Kennedy*, 2 DeG. M. & G. 228; and his contest is against the right, which he understands the claimants to assert and the assignee to concede by the preparation of the dividend sheet, of the joint creditors to rank on the estate to the exclusion of the separate creditors,

The claimants, if I correctly apprehend Mr. Mulock's position, do not dispute the law with the contestants, but say that there is joint estate, because the specific effects

which belonged to Walker & McBride retained that character *quoad* the joint creditors, although as between the partners Walker alone retained any property in them; and they confine their claim to this joint estate, not asserting any right to rank on the separate estate in competition with the separate creditors. It is, of course, in view of this position that I am asked to find, from such evidence as is before me, that only joint estate was seized, and that therefore the dividend is declared out of joint estate only.

The materials are, as I have remarked, very meagre. I have no information respecting the estate or the dividend from the assignee beyond what the dividend sheet affords. I find there the names of twelve creditors out of the whole number, considerably exceeding one hundred, shewn on the schedule, and the amount of claims filed \$2,769 out of the scheduled amount of \$22,480. A dividend of two per cent is declared, amounting to \$55.34 on the twelve claims.

I assume from the evidence already alluded to, that the sheriff seized all the effects which Walker had, whether those in which McBride had been interested or those acquired after his time; and I see the schedule in which Walker puts down as his assets, stock, &c., per inventory, \$7,822.89; book accounts, good, \$1,100; doubtful, \$500; personal property, \$500; making a total of \$9,922.89; but I have nothing to show the relation between this and the dividend, or out of what part of the assets the money was realized out of which the dividend was declared.

Under these circumstances I can only state generally my opinion of the law, without making any definite order. That will probably answer all purposes, and enable the assignee or the Judge to do whatever further may be required. Indeed I gather from the memorandum made by the Judge, in noting his formal ruling for the claimants, that what he desired was some such direction.

The cases to which I have been referred by Mr. Clark, and those cited to me by Mr. Mulock, viz., *Ex parte Morley*, L. R. 8 Chy. 1026, and *Ex parte Dear*, L. R. 1 Chy. D. 514, are all illustrations of a rule analogous to that laid

down by section 88 of the Insolvent Act of 1875, but we have to be careful, as has been on several occasions pointed out, not to adopt too hastily or without consideration of the terms of our own statute, rules founded only upon English decisions.

The English rule, no doubt, is very clearly shown by the cases cited, to which I may add *Ex parte Kensington*, 14 Ves. 447, and it is that a joint debt may be proved under a separate commission, provided two circumstances concur, viz., that there is no joint estate, and that there is no solvent partner; but that if there is any joint estate, however small or inadequate it may be, the joint debts cannot rank on the separate estate till the separate debts are paid.

Our rule, under section 88, is that, "If the insolvent owes debts both individually and as a member of a co-partnership, or as a member of two different co-partnerships, the claims against him shall rank first upon the estate by which the debts they represent were contracted, and shall only rank upon the other after all the creditors of that other have been paid in full." There is no room left by this precisely drawn enactment for the inquiry whether there is joint estate as a test of the right of the separate creditor to priority upon the separate estate. The criterion is the existence of joint and separate debts, not joint or separate property. If there are separate debts they have the absolute preferential right to payment out of the separate estate, and *vice versa* as to joint debts and joint property. When there is joint property the rule becomes the same in England as under our statute. As said by James, L. J., in *Ex parte Dear*, L. R. 1 Chy. D., at p. 519: "It is the settled rule that the joint estate must be first applied in payment of joint creditors, and the separate estate in payment of separate creditors, and that only the surplus of each estate is to be applied in satisfaction of the other class of creditors."

The controversy thus resolves itself into a question of fact: are the assets joint estate or separate estate, or how much of the one and how much of the other? If the divi-

dend has been derived wholly out of joint estate, the joint creditors alone have a right to share in it; if wholly out of separate estate, it belongs wholly to the separate creditors; if partly out of each class of assets, it should go *pro rata* to each class of debts.

I have no means of informing myself as to the facts beyond the evidence given by Mr. Walker, which indicates, though without particulars, that some part of the assets seized had belonged to Walker and McBride. In the cases of *Ex parte Morley* and *Ex parte Dear* the assets of the partnership had passed to the surviving partner, who was to assume the debts, just as in this case they passed to Walker who was to assume the debts. Those cases are direct authority for holding, what common sense would indicate without authority, that the creditors who had a right to look to the joint assets for payment could not be deprived of that right by the assumption by one partner of the assets with the obligation of paying the debts. The retiring partner's right was to have the debts paid out of those assets. That right was recognized and put into the form of a contract by the continuing partner's assumption of the debts. It was an equity which the terms of the dissolution affirmed and continued, unlike the transaction on which *Re Simpson* L. R. 9 Chy. 572, was decided, which made the assets the absolute property of the continuing partner freed from any such equity. And the creditors, who have no lien on the goods, but work out their remedies by means of the equities existing between the partners, have the right still to say that such of the joint assets as are traceable *in specie* into the hands of the assignee, were applicable, in the first place, to the payment of their debts. Speaking of the partnership assets in *Ex parte Dear*, James, L. J., uses language which *mutatis mutandis*, is very opposite to our purpose. He said, at p. 518, "Dear's executors would then have a right to say to the survivor, You may continue the business, but you must pay the debts. You have got property which was bought on our testator's credit, and for which we are now liable; and if you do not pay the

debts as they fall due, you have no right to have that property. From the moment there was the slightest default in the payment of one single debt, the right of the executors would be to say, We must have the assets in respect of which the debts for which we are liable were contracted applied in payment of those debts."

The assignee who knows what the assets were, and who has the means of inquiring to what extent they were those of the partnership, can, upon these principles, adjust the dividend. I have taken no notice of the short-lived partnership which succeeded that of Walker and McBride, because nothing has been shown to make it appear that affairs are complicated by any transactions of those associations. What I have said applies, however, to them as well as to the original partnership.

I think, in the course this appeal has taken, both parties should have their costs out of the estate.

PIPER V. SIMPSON AND LAWRY.

Lease—Non-execution by one lessee—Action on covenant.

The two defendants and one C., being in possession of premises as assignees of a covenant from the plaintiff for a lease, he caused a lease to the three to be drawn, which was executed by the defendants, on the representation that C. had executed a counterpart thereof, which was not the case, and the lease was never executed by him.

Held, affirming the judgment of the Common Pleas, that the evidence set out below, shewed that the intention of both the plaintiff and the defendants was, that C. should be a party to the lease, and that the plaintiff could not recover the rent due in an action upon the covenant in the lease.

APPEAL from the Common Pleas.

This was an action for the recovery of arrears of rent alleged to be due upon covenants contained in leases of premises in Hamilton.

The first count alleged that the plaintiff, by deed, let to the defendants the Hamilton Opera House, with certain personal property at \$400 a year, which the defendants covenanted to pay; and the second count alleged that the plaintiff, by deed, let to the defendants a part of the cellar under the Opera House, at \$30 a year, which the defendants covenanted to pay. It was averred that the rent was in each case payable monthly in advance, and that it was fifteen months in arrear.

It is unnecessary to notice the pleas except that of *non est factum*, which was pleaded to each count.

The leases were produced at the trial. They were signed and sealed by the defendants, but they were made to three persons as lessees, namely the two defendants and one Carscallen, who had not executed them.

They both bore date the 27th July, 1876. That of the Opera House contained recitals from which it appeared that the plaintiff had on 15th September, 1875, demised that tenement to one Harrison for a term of five months and thirteen days by deed, and that he had covenanted that he would, on certain terms and conditions mentioned, grant to Harrison a lease of the Opera House and personal property for a term of five years from the 3rd March, 1876: that

Harrison had, on 13th March, 1876, assigned his interest to McKinley, and that McKinley had, on 15th May, 1876, assigned to the three parties, viz., the two defendants and Carscallen. Upon the face of this lease, therefore, it appeared that it was made in pursuance of the covenant made by the plaintiff to Harrison.

The lease of the cellars contained no recitals. In other respects it was similar to that of the Opera House.

The defence was, that the leases were incomplete documents, and were not intended to operate as the deed of the defendants until executed by Carscallen.

The defendants had been examined before the County Judge, and their depositions, together with the leases themselves, formed the whole evidence at the trial.

The learned Chief Justice of the Queen's Bench, before whom the case was tried, entered a nonsuit, and this appeal is from the decision of the Court of Common Pleas refusing a rule *nisi* for a new trial.

The appeal was argued on the 17th May, 1880 (a).

Bethune, Q.C., for the appellant. There should not have been a nonsuit in this case. There was evidence to go to the jury shewing that the respondents were liable, although the lease was not executed by Carscallen. They had entered into actual occupation of the demised premises; the demise was executed by the plaintiff, and the term had vested in the respondents and Carscallen; and the mere fact that Carscallen did not sign the deed did not absolve them from their liability. Not having pleaded the nonjoinder of Carscallen, they are liable to be sued alone for the rent. Under the statute the lessees take as tenants in common, and not as joint tenants. He cited *Morgan v. Pike*, 14 C. B. 483; *Pitman v. Woodbury*, 3 Ex. 4.

F. Mackelcan, Q.C., for the respondents. The appellant's counsel put in as part of his case the respondents' statements as to the circumstances under which they signed the leases. He did not dispute their statements nor ask to

(a) Present:—BURTON, PATTERSON, and MORRISON, JJ. A., and ARMOUR, J.

have any question of fact submitted to the jury, but contended as a matter of law that their statements shewed a complete execution and delivery of the leases. The evidence shews that the possession, if any, by the respondents of the premises in question, was under the McKinley lease, and that Carscallen was one of the parties so in possession. They never accepted a lease to themselves only of the premises in question, nor is there any evidence that they took possession thereof under such a demise. The burden of proof being on the plaintiff, it is not sufficient for him to show that the defendants might have executed these leases in question absolutely, or might have been in possession under them; he cannot recover on mere conjecture, and the facts being consistent with the non-delivery by the defendants of the leases in question, no inference will be drawn from them to establish the plaintiff's case: *Avery v. Bowden*, 6 E. & B. 974; *Redmond v. Redmond*, 27 U. C. R. 224; *Campbell v. Hill*, 22 C. P. 526-529. The inference to be drawn from the evidence respecting the execution of the leases in question is, that such execution was conditional only, and that the delivery would not be absolute until the execution of the leases by Carscallen: *Trust and Loan Co. v. Ruttan*, 1 Sup. C. 564. The objection that the defence on which we rely is not open to us on the record, is now raised for the first time, but it can unquestionably be raised under the plea of *non est factum*. As Carscallen did not execute the lease, no plea in abatement as to his nonjoinder could have been raised. He cited *Cumberlege v. Lawson*, 1 C. B. N. S. 709, 724.

March 1, 1881. PATTERSON, J.A.—From the depositions, which are not very full and not always very distinct, I gather that the defendants and Carscallen took the premises for the purpose of letting them to actors or others for theatrical performances; that Carscallen was the manager for the three, receiving the payments and paying the rent to the plaintiff. The house was burnt. We are not told when this occurred, nor are we told up to what time the rent was

paid. One of the defendants does say that they occupied up to the time of the fire, and that they paid no rent after the fire; but I cannot ascertain from anything before us whether the rent now demanded is for a period before or after the fire. I infer from the facts which are stated that the occupation by the defendants and Carscallen began when they got the assignment from McKinley, on 16th May, 1876, two or three months after Harrison's short term had expired, and two months or more before the lease was executed by the plaintiff, and when their only right to possession was under the covenant for a lease for five years. The only suggestion why Carscallen did not execute the lease is contained in a statement of the defendant Simpson, who says that Carscallen told him that he refused to execute because the lease was not in accordance with an agreement which had been made in the St. Nicholas Hotel. The defendants were not aware until after the fire that Carscallen had not executed the lease; at least Simpson says this for himself, and I assume it is true also of Lawry, who says: "Mr. Piper brought me a lease. He said Carscallen had a lease and this one was for him. I do not remember signing another lease or not. All I know about it is what Mr. Piper told me at the time." From this the natural conclusion seems to be, that the plaintiff gave Lawry to understand that Carscallen had concurred in completing the lease and had the counterpart, which however turned out not to be so.

We have had the assistance of an able argument by Mr. Bethune, who has urged every consideration on which the plaintiff could rely, but I have not been able to see how a verdict for the plaintiff could be supported upon the evidence before us. I think the making of the deed by the defendants is not only unproved but is disproved. There was no intention on the part of the plaintiff to deal with them apart from Carscallen, and they had no idea of so dealing. The deed itself, the recitals, the fact that Carscallen was the active manager, and, in short, the whole transaction show that. It may be that the defendants are

liable for the rent, and that Carscallen is jointly liable with them. The vague character of the evidence, and particularly the reticence respecting dates, makes it impossible to do more than conjecture how this may be. The three seem to have been in as tenants at will or perhaps (having paid rent) as tenants from year to year. I cannot say what was the nature of their tenancy, or how it was determined, or that it was in fact determined. The acceptance of a lease would, no doubt, have determined it; but the lease was never completed. The matter, however, does not turn on Carscallen's liability for rent. There is no count for use and occupation, and there is no evidence sufficiently definite to prove occupation to any certain time. The plaintiff has to fail unless he fixes these defendants as covenantors, and this he has not succeeded in doing.

Something was said upon the argument as to the doctrine of *escrow*. There does not appear to me to be any room for that discussion here. There was no delivery in *escrow*—there was no delivery at all. The defendants, according to the evidence, signed and sealed the deed as part of the execution of it. What remained to be done was the signature and sealing by Carscallen, and after that the delivery by or for all three—not a delivery in *escrow* by any of them, but an operative delivery, once for all, to be made when the deed was otherwise complete, but not before that. The language of Lord Denman in *Latch v. Wedlake*, 11 A. & E. 959, was referred to in the argument. He said at p. 965, that there was a "question proper to have been submitted to the jury, whether the intention of all the parties was not that Rosser Thomas should be an actual party to the agreement; whether the plaintiff on his part, did not contract on the faith that Rosser Thomas should join, and he thereby have his additional security for the performance of the agreement; and whether the defendants on theirs did not execute upon the understanding that Rosser Thomas was consenting to, and would join in executing the instrument. If the jury had so thought, the transaction would, under the circumstances found, have been

incomplete; for, wherever an instrument is to be executed by several parties, there must be some interval between the execution of each; and if all be not present at the same time, that interval may be considerable; and it cannot be contended that the mere fact of execution by one conclusively binds him, when that has been done on the faith that all will execute, and any one shall refuse." These observations precisely fit this case, changing the name Rosser Thomas for Carscallen, and remembering that the fact which was there to be found by the jury is here shown on the face of the evidence on which the plaintiff relies, and shown so clearly that a verdict to the contrary would be against evidence.

I am of opinion that we must dismiss this appeal, with costs.

BURTON, and MORRISON, J.J.A., and ARMOUR, J., concurred.

Appeal dismissed.

WALTON ET UX. V. THE CORPORATION OF THE COUNTY
OF YORK.

Ways—Ditches—Necessity to fence, a question for the jury.

In driving along a county road the plaintiffs were injured by their horse and buggy falling into a ditch at the side of the road. It was shewn that the roadway between the ditches was thirty feet wide: that the ditch was of the same character as those along other roads in the county: and that in some places where the ditches are deeper than usual there are guards. There was evidence produced on the part of plaintiffs which, if believed, established facts from which a jury might draw the inference that the ditch constructed where and as it was was dangerous, although there was evidence on the part of the defendants to the contrary.

The jury found a verdict for the plaintiffs, but the Court of Common Pleas afterwards, upon a rule *nisi* to enter a nonsuit or for a new trial, granted a nonsuit, holding that the having made a ditch without guards or railings, or without slanting the roadway to the bottom of the ditch so that a person could drive into it without upsetting, was no evidence of neglect on the defendants' part to keep the road in repair.

Held, reversing this judgment, 30 C. P. 217, that it was a question of fact for the jury, whether, having regard to all the circumstances, the road was in a state reasonably safe and fit for ordinary travel.

As the Court below had pronounced no opinion as to whether there should be a new trial or not, the appeal was simply allowed, setting aside the nonsuit, but leaving the question of new trial untouched.

These were appeals from the judgments of the Courts of Common Pleas, and Queen's Bench, making absolute a rule *nisi* to enter a nonsuit. The Court of Queen's Bench followed the decision of the Common Pleas, which is reported 30 C. P. 217.

The actions were brought against the County of York, to recover damages for alleged negligence in allowing a road belonging to the county to become out of repair and dangerous to persons using it, so that the plaintiffs, lawfully travelling with their horse and buggy along the road, and close to a deep excavation, were thrown into the excavation, and injured.

The declaration contained two counts not materially differing from each other; the first stating the mode under which the defendants acquired the road, and that the grant to them was subject to the condition that they should keep it in thorough repair; the other charging them on their statutory duty to keep it in repair.

The plea of not guilty was the only material issue.

The cases were tried before Mr. Justice Osler and a jury, and resulted in verdicts for the plaintiffs. The evidence is fully set out in the report of the case in the Common Pleas, 30 C. P. 217.

The defendants subsequently obtained rules *nisi* to set aside the verdicts, and enter nonsuits, pursuant to leave reserved, or for new trials, because the verdicts were against evidence and the weight of evidence, and for misdirection. The rules were made absolute to enter nonsuits.

The plaintiffs appealed.

The appeals were argued on the 17th January, 1881 (a).

Donovan, for the appellants. The Court below should not have disturbed the verdict, as the evidence proved that the ditch in question was unnecessarily broad and deep, and under such circumstances it should have been fenced. The whole question, however, was one for the jury, and there was no power to withdraw it from them. It is held in *Dublin, &c. R. W. Co. Slattery*, L. R. 3 App. 1155, that when there is conflicting evidence on a question of fact, whatever may be the opinion of the Judge who tries the cause as to the value of that evidence, he must leave the consideration of it for the decision of the jury. He referred to *Lucas v. Township of Moore*, 3 App. R. 602; *Harold v. Corporations of Simcoe and Ontario*, 16 C. P. 50; *Castor v. Corporation of Uxbridge*, 39 U. C. R. 113; *Caswell v. St. Mary's, &c., Road Co.*, 28 U. C. R. 247; *Davis v. Corporation of Bangor*, 42 Me. 522.

Kerr, Q. C., and *W. Redford Mulock*, for the respondents. In order to sustain this action it was incumbent on the appellants to prove that the road was out of repair; but the evidence did not establish this. The question whether a road is out of repair depends on circumstances. It was shewn here that the ditch was similar to those usually constructed for county roads, and that it was not deeper than was required to carry away the water and keep the

(a) *Present*.—BURTON, PATTERSON, and MORRISON, JJ.A., and PROUDFOOT, V.C.

road dry, and the appellants were therefore properly nonsuited. The appellants contend that the road should have been fenced, but no case has been cited as authority for such a contention; and it would be most unreasonable if the burden of fencing all the roads in their jurisdiction were cast upon the respondents. At all events contributory negligence was shewn, and if the judgment of the Court below is disturbed a new trial should be ordered. They cited *Toms v. Corporation of Whitby*, 35 U. C. R. 195, 209; *Sykes v. Town of Pawlet*, 5 Amer. 295; *McCarthy v. Corporation of Oshawa*, 19 U. C. R. 245; *Ringland v. Corporation of Toronto*, 23 C. P. 93; *Ray v. Corporation of Petrolia*, 24 C. P. 73; *Howard v. Bridgewater*, 16 Pick. 189; *Merrill v. Hampden*, 26 Me. 234; *Lucas v. Township of Moore*, 3 App. R. 602; *Hutton v. Corporation of Windsor*, 34 U. C. R. 487; *Burns v. Corporation of Toronto*, 42 U. C. R. 560; *Maxwell v. The Township of Clarke*, 4 App. R. 460.

March 26, 1881. BURTON, J.A.—The question now before us is confined to whether the Court were justified in entering a nonsuit. Sitting here we are not in a position to answer the question whether the verdict was so contrary to the weight of evidence as would have warranted a new trial, but are confined to the single point of whether there was any evidence of a state of facts from which the Judge could say that negligence might be inferred.

If any such facts exist the Judge would not be justified in withdrawing the case from the jury because, in his opinion, negligence ought not to be inferred.

It may not be always an easy matter to define the precise duty of a municipality under the Statute with regard to highways, but it may be laid down generally that it has done its duty when it has prepared a roadway of suitable width in such a manner that it can be conveniently and safely travelled.

If for the purpose of preserving the road-bed in a good

state of repair the municipal authorities deem it desirable to make ditches on the sides of the roadway so laid out, they would be warranted in making them, although that might to some extent interfere with the rights of the public to travel over the portion of the highway outside the travelled bed.

But in making these ditches they are bound to the exercise of reasonable skill and care, as well as in the preparation and repairing of the travelled way itself.

It is not disputed that if in some places this ditch was more than four feet in depth, it would be the duty of the municipality to protect the travelling public by the erection of a railing, or in some other method, and many cases might be suggested in which some such precaution might be necessary, as at the foot of a hill, &c. It is in all cases a question of fact whether such a precaution is requisite, or whether the ditch itself has been properly or negligently made.

The counsel for the corporation urged, indeed, that if this nonsuit were not sustained the consequences to the corporation would be ruinous. In making that suggestion he has, I think, drawn somewhat on his imagination; but even were the result apprehended likely to prove as bad as suggested, the remedy should, I think, be sought from the legislature, who might enact that such roads might, upon the application of the municipality interested, be subjected to the examination of a government inspector, whose decision as to the plan adopted, or the mode of its execution, should be conclusive.

At present, and in the present state of the law, it must, in each case, be a question of fact for the consideration of a jury whether a railing is necessary, or whether the ditch is constructed in such a manner that a person using ordinary care in passing near it would not incur the risk of damage.

In the case of *Howe v. The Hamilton and North-western R. W. Co.*, 3 App. R. 336, this Court held that, apart altogether from the question of whether there was evidence of the want

of due and reasonable care on the part of the defendants, the Judge should have withdrawn the case from the jury, because, assuming it to exist, there was no evidence of its connection with the accident in the relation of cause and effect. The counsel for the plaintiffs in this case contended that the defendants had no right to make the ditches upon any part of the sixty-six feet which constituted the highway, but I apprehend it to be clear that if the plaintiffs' evidence had disclosed that the ditch in question had been made with all reasonable skill and care, and the evidence had stopped there, the Judge must have withdrawn the case from the jury, because at the close of the plaintiffs' case they had failed to satisfy the onus of proof lying upon them; but that is not this case. There was evidence adduced on the part of the plaintiffs which, if believed, established facts from which the jury might have drawn the inference that this ditch, constructed as and where it was, was fraught with danger to persons using the road. It is true there is evidence adduced on the part of the defendants to the contrary; and it may be that that evidence was more probable, and should have prevailed. The defendants' engineer, however, states that the ditches could be so made as to be less dangerous, but would have in that case to be more frequently renewed; reducing it to a question of expense. But whether the evidence on one side be overwhelmingly strong or weak, or conflicting, it is not in the power of the Judge to withdraw the case from the jury, whose province it is to decide upon it; and I think the learned Judge at the trial very properly decided to leave it to them. If the jury ignorantly or perversely chose to disregard the Judge's directions, (although I do not say in this case they so acted,) the Court could have provided a remedy by granting a new trial.

Some of the Judges who decided this case are probably acquainted with the locality, and are impressed therefore with the injustice of the conclusion at which the jury have arrived. If so, it is to be regretted that a new trial had not been ordered. But there being conflicting

evidence as to the state of the ditches, and it being clear that there may be cases in which it would be the duty of the defendants to put up some protection, we cannot say, as a question of law, that at this particular point such protection was not necessary, or that the ditches were constructed with reasonable skill and care, in accordance with the duty thrown upon the defendants. These were matters for the consideration of the jury, and the mere preponderance of evidence in favour of the defendants cannot transfer that right of decision from them to the Judge.

The question of contributory negligence was clearly for the jury, and their finding upon it is acquiesced in and approved of by the Court below.

I think, therefore, for these reasons, that the appeal should be allowed, with costs, and the rule to enter a non-suit discharged, with costs.

PATTERSON, J. A.—These actions are brought against the corporation of the County of York to recover damages for injuries sustained by the plaintiffs, who are husband and wife, on the occasion of the upsetting of the carriage in which they were returning home one evening from Scarborough fair. The accident is said to have been caused by their horse shying and running the wheels into a ditch or drain at the side of the travelled portion of the roadway. The complaint is, that the ditches on each side of the road were too near each other, thus narrowing the travelled part of the road more than was proper in that locality; or that the construction of them was faulty, because the sides were not sloped gradually down; or that some precaution was not taken, if it was necessary to have a ditch of that kind in that particular place, to protect travellers by a rail or something of that sort; and the form of the charge is that the Corporation was guilty of negligence in the matter, and failed to perform the duty imposed upon it by Statute to keep the road in repair.

The ditches were constructed for the purpose of draining the roadway, and in performance of the very duty which

the Corporation is now charged with having neglected. There is of course, in the evidence, the usual variety of opinion as to what was the precise default. Some of Mrs. Walton's relations think there should be no ditch at all, but only a gradual slope of the road; other witnesses think the ditch itself should be sloped gradually; others that it should have guards; and one or two say it is just the ordinary ditch that is alongside of a travelled road in the country, and that there is nothing peculiar about it. Those are the plaintiffs' witnesses. The facts are not varied by the evidence for the defence, further than that there is exact evidence given of the depth of the ditch and the degree of inclination of the sides. It is shewn that the roadway between the ditches is about thirty feet wide; that the ditch is of the same character as those along the other roads in the County; that in some places where the ditches are deeper than usual there are guards; and that to fence them all would require a hundred miles of fences, and involve a very heavy expense.

The Court of Common Pleas, whose decision was followed in the Queen's Bench case without independent consideration by that Court, considered that the plaintiffs had failed to establish the charge of neglect, and accordingly made absolute a rule to enter a nonsuit. In giving the judgment of the Court, the learned Chief Justice of the Common Pleas, at p. 223, remarked that "Ditches coterminous with the highways are a necessity. The outcry is not that the drains are not fenced, but that the roads are not drained. It is the road, the travelled part of the road, which people want to have made well, and kept in order; and they know that the first thing to do to make a good road is to make a good drain; and they know that these drains are never covered or fenced off. I will not say that no country ditch is to be fenced off or guarded. This county has made it a rule to fence off all ditches of four feet depth or more. I do not say whether that is the proper rule in such cases or not. It is only necessary I should give an opinion upon the ditch which is now in question, at the side of

the road, as that road has been described. And my opinion is, so far as the Court is to determine the question, that the defendants were not and are not guilty of neglect in not fencing the ditch complained of from the travelled road. In other words, the highway was not out of repair by reason of there being such a ditch as the one in question running alongside of such a roadway. * * If all the ditches of the county and of every county in the Province are to be guarded because an accident may happen to a person who, or to a conveyance which happens to get into one of them, it would impose on municipalities an intolerable burden, and the performance of an almost impossible duty, and the fences put up to shut off the ditch from the road would be a nuisance greater than the ditch itself; the remedy would be worse than the disease. In this case, notwithstanding the very great misfortune which befel the plaintiffs, I think the defendants are not responsible for it. It was an incident and accident of travelling, which can never be made quite safe; and the injury to the plaintiffs was occasioned by one of these accidents, and not by the neglect of the defendants." I extract these observations because they present in a distinct manner a sensible view, which a jury, whose attention was given to a dispassionate investigation of the matter, might not unreasonably be expected to adopt. The argument against the defendants founded on the position of the ditches does not appear to me to have much force. There is no absolute right to have the whole space from fence to fence in a fit state for travelling. It is all highway, by legal definition; but the duty of the corporation is only to have so much of it fit for the use of vehicles as will make a reasonably safe and convenient road for the requirements of the locality and the ordinary traffic expected to pass over it. Thirty feet of roadway is not shewn to be too little for this purpose; and if there are to be ditches at all, the danger of an upset by a shying horse running into them must be a good deal dependent on the driver himself, who may drive near a ditch at the side of a wide road as well as of a narrower one.

When a corporation whose duty it is to keep a road in repair, and to whom express power is given in several shapes, by the Municipal Act, to make by-laws and to aid in other ways in doing what is deemed necessary for that purpose, has, in the discharge of its duty, decided that a certain mode of construction or repair is proper and is sufficient for the place, there may be good reasons found for contending that the discretion exercised should not be subject to review by a jury. It would, however, be a difficult matter to lay down a rule upon which, even conceding the exclusive right of the corporation to determine what ought to be done, a controversy like the present one could be decided on legal grounds alone. There would always be the question whether the course decided upon had been followed out with reasonable skill and care, or whether a work which ought to have been executed so as to involve little or no danger to travellers had, by reason of negligence or want of ordinary skill, become in itself a source of danger.

I have not been able after carefully considering the case and after having had the assistance of an able argument for the respondents, to find any satisfactory reason for taking this case out of the ordinary rule, now so well settled, that the question of fact is whether the road, having regard to all proper considerations, was in a state reasonably safe and fit for the ordinary travel of the locality. In *Lucas v. Moore*, 3 App. 602, a case in which a wide and deep ditch occupied half the highway and created a danger of the most palpable character, we felt ourselves compelled to act upon that rule by directing a new trial, because the charge to the jury appeared to us to assume the fact of non-repair, in place of leaving it entirely to the jury. The rule is very well expressed in the judgment of the Court of Queen's Bench in *Caswell v. St. Mary's Road Co.*, 28 U. C. R., at p. 254, where it is said: "It must be a question of fact altogether for the jury to say whether the place alleged to have been out of order was dangerous, and if so, from what cause, and if from a natural cause or process,

whether the persons liable to repair the road could reasonably and conveniently, as regarded expenditure and labour, have made it safe for use."

In the present case, as the verdict for the plaintiffs was a general verdict only, we do not know upon what view of the matter the jury proceeded. It is, I think, useful in cases of this kind, in which the negligence that entitles the plaintiff to recover is the failure to perform some duty incumbent on the defendant, to ascertain from the jury what is the particular in which they find the default to consist—what was done which should not have been done, or what was left undone which ought to have been done. A finding in that shape is often useful when the case comes for consideration before the Court; and I am always of opinion that the danger of a verdict being rendered under the influence of mere sympathy, is lessened by letting the jury dispose separately of the questions on which the decision ought to turn.

I by no means assert that a nonsuit may not be as appropriate in a case of this kind as in any other case; and I do not say that, if the jury had shown by answers to questions the precise grounds of their finding, it might not have appeared that, having regard to the powers and duties of the corporation under the statute, the plaintiffs could not, as a matter of law, succeed. Upon that point I form no opinion. But, as the case comes before us at present, I cannot satisfy myself that it could properly have been withdrawn from the jury. I therefore think we cannot permit the nonsuit to stand, and that we ought to allow the appeal.

I am not prepared however to go so far as to say the rule *nisi* should have been discharged. It asks in the alternative for a new trial. The new trial has neither been granted nor refused, and therefore the case does not come literally within the third sub-section of section 18 of the Act respecting the Court of Appeal, R. S. O. ch. 38. In fact we do not know in what way the Courts below would have dealt with that part of the rule. The case resembles in

this respect the case of *Hamilton v. Myles*, which was before this Court in 1874. See my remarks in 24 C. P. at p. 325. I believe the Court of Common Pleas made the rule absolute for a new trial in that case after the appeal against the rule for a nonsuit had been allowed.

I think our proper course is, to do as we did upon that occasion, and leaving the question of new trial untouched, simply allow this appeal, with costs.

MORRISON, J.A., and PROUDFOOT, V.C., concurred.

Appeal allowed.

AGRICULTURAL SAVINGS AND LOAN ASSOCIATION V.
FEDERAL BANK.

*Cheque—Forged endorsement of—Payment by bank—Liability to drawer—
Negligence—Estoppel.*

The plaintiffs' valuator, one H., filled in the blanks in an application for a loan on statements of one S., who forged the names of J. T. B. and I. B. as applicants, and although H. had never seen the property or the applicants, he certified a valuation to the plaintiffs, who accepted the loan, and signed his name as witness to the signatures of the applicants. Cheques in payment thereof to the order of the supposed borrowers were obtained by S., who forged the names of the payees, endorsed his own name, and received payment of the cheques, which were drawn upon the defendants, through other banks, who presented them to the defendants and received payment in good faith. The fraud was not discovered for some time, during which the cheques were returned to the plaintiffs at the end of the month as paid, and the usual acknowledgement of the correctness of the account was duly signed.

Held, affirming the judgment of the Queen's Bench, 45 U. C. R. 214, that the plaintiffs were not estopped from recovering the amount paid on the forged endorsements from the defendants by their agent's negligence, as it did not occur in the transaction itself, and was not the proximate cause of their loss.

Held, also, that the acknowledgment of the plaintiffs of the correctness of the account at the end of the month, was at most an acknowledgment of the balance on the assumption that the cheques had been paid to the proper parties.

Held, also, that it could not be said that the cheques were made payable to fictitious payees, and were therefore payable to bearer.

APPEAL from the Court of Queen's Bench.

Declaration on the common money counts.

Pleas, never indebted and payment.

One Hughes was a valuator and agent for the plaintiffs at Dresden, and one Stobbs came to him in July, 1877, stating that his brother-in-law, named Bee, wanted a loan of \$2,000. Hughes gave him a printed form of application, he filling the blanks on Stobbs's statements, and gave it to him to have signed. Stobbs returned it to him with the names "John T. Bee and Isaac Bee, P. O. Wheatley," apparently signed as applicants for the loan, to be secured on south-west and south-east quarters, (100 acres,) of lot 15, in the 2nd concession of Romney. The loan "to be remitted to me by cheque, addressed to Alfred Hughes, of Dresden P. O., and this will be your authority for doing so at my risk. Witness, Albert Hughes, Valuator."

Hughes certified that he had personally inspected the property, and that his report contained a correct description; that the value was \$4,600, and that a brick house was being built. Hughes in fact never saw the property, and did not see the signatures, though he placed his name as witness.

He acted solely on what Stobbs told him, believing all he said to be correct.

The two Bees knew nothing whatever of the matter; they never applied for the loan, and their names were forged to the application by Stobbs.

Hughes sent the application to the plaintiffs at London, who agreed to make the loan, and their solicitor proceeded to examine the title, which was approved.

There further appeared a mortgage dated the 24th of July, 1877, executed by Isaac Bee and John T. Bee, to the Society, for \$2,000, to be void on payment of \$3,144, in ten annual instalments of \$314.40. This was witnessed by Thomas R. Stobbs, and an affidavit made by him to the due execution.

The plaintiffs sent the mortgage to Hughes, who sent it to Stobbs, then living in Chatham, and Stobbs sent it direct to the plaintiffs' solicitor, apparently well executed.

The solicitor certified to the plaintiffs that he had investigated the title and found it good, and that I. and J. Bee had executed a mortgage, and they were to effect an insurance on the building.

The mortgage was registered on the 2nd August, 1877.

On the 21st of August, 1877, the plaintiffs' manager, Mr. Roe, wrote a letter, addressed to Mr. Isaac Bee, Chatham, stating that his telegram had been received, and enclosing a cheque for \$500 on defendants' bank, and sending his application paper for insurance on the buildings, which the plaintiffs effected.

The telegram had been sent by Stobbs, who obtained the cheque so sent.

It was payable to Isaac Bee and John T. Bee, or order, "Re loan on mortgage." These cheques were headed pay-

able, without discount, at any branch of defendants' bank. It was endorsed Isaac Bee, John T. Bee, Thomas R. Stobbs.

On the 27th August, 1877, a cheque for \$300, payable in like manner to Bee's order, was sent in a letter addressed as above.

Stobbs then sent certificates that the brick house was nearly finished ; and the plaintiffs, on September 5th, 1877, sent a third cheque for \$1,173.20, which, deducting the amount paid for insurance, made up the \$2,000. This was payable like the first.

All three cheques professed to be endorsed by the two Bees and by Stobbs, who obtained the money on each, not from defendants' bank direct, but from the Merchants' Bank and Bank of Commerce, through whom they were received and paid by defendants' bank.

Stobbs corresponded with the plaintiffs under the name of Isaac Bee, and acknowledged receipt of the cheques.

On June 19, 1878, Stobbs sent \$100 to the plaintiffs in Bee's name, in part payment of the annual instalment, and directing them to communicate through T. R. Stobbs, Leamington, where he then resided.

On the 23rd July, 1878, Stobbs sent in his own name \$100, and on September 21, 1877, \$118 for the first annual instalment. The first intimation plaintiffs had of anything being wrong was by letter 17th June, 1879, from the solicitors of the Bees, who had discovered that such a mortgage had been placed on record, that it was a forgery, and that they suspected Stobbs as the culprit.

The plaintiffs' manager proceeded to Chatham, and had a warrant issued for Stobbs, who was arrested, committed for trial, obtained bail, and absconded shortly before the Assizes. Defendants were at once informed of what had occurred.

These cheques were paid by defendants in good faith, and in the usual course of business were handed by defendants to plaintiffs, with other vouchers, in the commencement of the month following the receipt of the same at the bank.

The bank book of the plaintiffs was put in, shewing the balances at the end of each month; and this went on for many months, till the discovery of this fraud and forgery.

The case was tried at London, before Wilson, C. J., who entered a verdict for the defendants, leaving all to the Court.

There was no doubt whatever of the forgery. The Bees never authorized, or recognized, or derived any benefit from the transactions, which from beginning to end seemed a well managed fraud on the part of Stobbs, who forged their names to the application, the mortgage, the letters, and the endorsements of the cheques.

The plaintiffs requested defendants to credit them with the amounts of these three cheques, but defendants refused.

A rule *nisi* to enter a verdict for the plaintiffs was made absolute. The case is reported 45 U. C. R. 214.

The defendants appealed.

The case was argued on the 13th January, 1881 (a).

Robinson, Q.C., and Kerr, Q. C., for the appellants. The question in this appeal really is, whether the respondents were guilty of such negligence as to afford the bank an answer to this action. From the inception to the conclusion of this transaction it was clearly shewn that the respondents acted in a most careless manner, and neglected to use the most ordinary precautions, and there can be no doubt, on the evidence, that the loss never would have been sustained but for the negligence and misrepresentations of their agent and the failure of the respondents to take those precautions which loaning companies are accustomed to take for their security, and which we were justified in supposing they had taken in this case: *Orr v. Union Bank of Scotland*, 1 McQ. H. L. C. 513; *Young v. Grote*, 4 Bing. 255; *Arnold v. The Cheque Bank*, L. R. 1 C. P. D. 578, 586, 587; *Ogden v. Benas*, L. R. 9 C. P. 513; *Buxendale v. Bennett*, L. R. 3 Q. B. D. 525; *Bigelow on Bills and Notes*, 574; *Toms v. Corporation of Whitby*,

(a) *Present*.—BURTON, PATTERSON, and ORRISON, J.J.A., and OSLEE, J.

35 U. C. R. 195; *Coles v. Bank of England*, 10 A. & E. 445; *Phillips v. imThurn*, L. R. 1 C. P. 470; *Cooper v. Meyer*, 10 B. & C. 468; *Beeman v. Duck*, 11 M. & W. 251. We admit that in order to relieve the appellants from liability under such circumstances, the negligence must be "in the transaction itself," but our contention is, that the "transaction" was not merely the drawing the cheques, but the whole transaction commencing with the application. The respondents, however, have precluded themselves from objecting that the endorsements are not those upon which they authorized the appellants to pay the cheques, inasmuch as they acknowledged the correctness of their bank account when the cancelled cheques were given to them. The receipt is taken by the bank so as to compel their customers to examine the account when they give up the vouchers: *Morse on Banking*, 2nd ed. 59, 358. Another ground of defence is, that under the circumstances the loan was a fictitious one, and the cheques must, therefore, be treated as payable to bearer. In any event, we are entitled to credit for \$128, which the respondents received from Stubbs in part payment of the money received by him through the forged endorsements.

Bayly, for the respondents. The case of *Arnold v. The Cheque Bank*, L. R. 1 C. P. D. 578, shews that the negligence, to have the effect of an estoppel, must be in the transaction itself, which here was the drawing and endorsing the cheques, and not everything connected with the loan as contended by the appellants: *Swan v. North British Australasian Company*, 2 H. & C. 182; *Bank of Ireland v. Trustees of Evans Charities*, 5 H. L. C. 389. This case is governed by *Robarts v. Tucker*, 16 Q. B. 560, which is very similar, only the circumstances of the present case are stronger in the respondents' favor, as in that case the forged endorsements were actually on the draft when it was accepted, and the words "or order" were, at the instance of the forger himself, added to the draft, which was then handed to him. The monthly settlement of accounts relied on by the appellants simply had the effect of throwing the

onus on us of proving error from any cause, but it is no defence when forgery is established. The contention that the payees are to be considered as fictitious persons cannot be supported, as the evidence shews that they were the names of the owners of the land on which the loan was sought.

March, 1, 1881. BURTON, J.A.—This is a case of considerable importance to banking corporations, and an adverse decision may possibly induce them to seek from the legislature similar protection to that afforded to bankers in the United Kingdom.

A cheque is generally defined to be a draft on a banker payable to bearer on demand, and although no doubt an instrument of the same kind payable to order is perfectly valid, there being nothing in point of law to prevent a cheque being drawn to order, practically all cheques were payable to bearer in England before the passing of the 16 & 17 Vic. ch. 59.

In the case to which we have been referred of *Roberts v. Tucker*, 16 Q. B. 560, in which the question arose as to the liability of bankers who had paid a bill of exchange accepted payable at their bank upon a forged endorsement, Parke, B., remarks, at p. 579, "If bankers wish to avoid the responsibility of deciding on the genuineness of endorsements, they may require their customers to domicile their bills at their own offices, and to honour them by giving a cheque upon their banker."

A draft on a banker payable to order was, previously to the passing of the Act I have referred to, treated as an inland bill of exchange, and subject to the same stamps as an ordinary bill of exchange. When therefore the legislature proposed to exempt a draft on a banker, payable to order, from the stamp duty, it was felt that this change would necessarily impose on bankers a great deal of additional responsibility. In paying a *cheque proper*, so to speak, that is, a cheque payable to bearer, the banker had only to satisfy himself of the genuineness of his customer's

signature, with which he was acquainted, but in the case of a draft payable to order he was bound to satisfy himself of the genuineness of signatures which he had no means of knowing, and yet he would in the latter case be liable in case he paid the wrong party. It is not, therefore, surprising that when the legislature sanctioned this new form of draft as a cheque, they at the same time interposed a remedy so as to give the bankers protection, and place them in the same position as when paying cheques made payable to bearer.

I am old enough to remember the time when in Canada a cheque payable to order was the exception, although, without any legislation similar to that in England, it has now become a very common custom to make cheques payable to order.

Many nice questions might arise as to the liability of bankers in respect of such cheques. They are expected to be paid on presentation, and yet it is not easy to see how an action could be maintainable for refusing to honor such a cheque where the bankers required in good faith to make enquiries about the endorsement.

Under the English Act, if the cheque purports to be endorsed by the person to whom it is made payable, the banker is relieved from enquiring into the authority to make the endorsement, or the identity of parties making it with those named as payees, and his liability remains as it stood before in the case of cheques payable to bearer; but we have no such enactment here. The bank, having paid the cheques of the plaintiffs upon endorsements which are admittedly forged, are without defence to this action unless the plaintiffs have been guilty of such negligence as to disentitle them to recover, or the alleged settlements at the time of the delivering back the cheques are an answer.

It is urged that if the plaintiffs had used due caution they themselves would not have been imposed upon and induced to make the loan, on account of which the cheques in question were given: that the person who so

imposed upon them was their own agent, and that they were chargeable with any knowledge which he had, and that they negligently issued and forwarded the cheques to their own fraudulent agent and thereby placed it in his power to procure the proceeds.

I do not go through in detail the supposed grounds of negligence attributed to the plaintiffs in connection with the granting of the loan, because if the handing the cheques to the agent without the authority of the supposed borrowers would not in itself be sufficient to disentitle these plaintiffs to recover, as I think it would not, it is manifest that the more remote transactions to which I have referred could not have that effect.

Now assume for a moment that the borrowing by the Messrs. Bee had been a real instead of a fictitious transaction, and the plaintiffs upon a fraudulent representation made to them by the agent had handed the cheques to him, and he had, instead of delivering them to the borrowers, endorsed them and appropriated the moneys, it is clear that as between the borrowers and the plaintiffs the loss would fall upon the latter, and they would be bound to make good the amount to the borrowers. But would it be any answer by the bank when called upon for the money which they had chosen to pay away upon the forged endorsement? The plaintiffs would have been negligent, and as a consequence of that negligence would have been liable to pay again the amount due to the borrowers, but what has that to do with the wrongful payment by the bank? As said by Bramwell, C. J., in *Baxendale v. Bennett*, L. R. 3 Q. B. 530, this negligence is not the proximate or effective cause of the fraud, a crime was necessary for its completion.

So again Parke, B., in delivering the opinion of the Judges in the House of Lords in *Bank of Ireland v. Trustees of Evans' Charities*, 5 H. L. C. 389, at p. 410, gives this as an instance in which a person would not be liable: "If a man should lose his cheque book, or neglect to lock the desk in which it is kept, and a servant or stranger should take it, it is impossible, in our opinion, to contend

that a banker paying his forged cheque would be enabled to charge his customer with that payment."

In point of fact the whole question is narrowed down, as Mr. Robinson admitted, as to what is meant in the decisions by "the transaction itself," as it appears now to be clearly established that the negligence which can operate by way of estoppel must be in the transaction itself and must be the proximate cause of leading the party into the mistake, and also must be the neglect of some duty that is owing to the person led into that belief, and not merely neglect of what would be prudent in respect to the party himself, or even of some duty owing to third persons with whom those seeking to set up the estoppel are not privy.

Young v. Grote, 4 Bing. 253, though sometimes questioned upon the ground on which it appears to have been decided, comes within the rule I have quoted, the bankers there being misled by negligence of the drawer of the cheque in the mode of drawing the cheque itself.

I find no authority for holding that the negligence of a plaintiff can be relied on as an estoppel, unless it is in the transaction itself, and is the proximate cause of the defendant doing what he does.

Very little importance is, in my opinion, to be attached to the acknowledgments signed by the plaintiffs of the correctness of the account at the time of the delivery back of the cancelled cheques. It is at most a mere acknowledgment of the correctness of the balance on the assumption that the cheques issued by the plaintiffs had been paid to the proper parties. The banks assumed a responsibility that they need not have undertaken in paying cheques payable to order. Having undertaken it the plaintiffs had a right to assume that they had satisfied themselves that they were paying to the proper parties, and when they discovered the mistake they were at liberty to insist that the moneys deposited in the bank to their credit should still be there subject to their order.

I agree with the Court below that it is not in our power

to give the defendants the benefit of the payments made by Stobbs ; but it is inequitable that the plaintiffs should retain those payments and be allowed interest.

I am of opinion therefore that the judgment should be affirmed, and this appeal dismissed, with costs.

OSLER, J.—First, it is said that the defendants are absolved on the ground of the plaintiffs' negligence. It is admitted that such negligence must, to enable the defendants to avail themselves of it, have been in the transaction itself, and we are asked to scrutinize the conduct of the plaintiffs from the inception of the loan and to say that there was imprudence here, lack of diligence there and blindness elsewhere, throughout, culminating in the supreme act of negligence in transmitting the cheques for the amount of the loan to the agent Stobbs, all this taken together being the transaction.

But the "transaction" consisted, in my opinion, of the cheques and the endorsements, and there was nothing in the plaintiffs' conduct in regard to them which was calculated to mislead the defendants. We could not hold otherwise without going directly counter to *Arnold v. The Cheque Bank*, L. R. 1 C. P. D. 579, and the authorities on which that case was decided.

Then it was strenuously urged that the transaction, meaning thereby the loan and mortgage, was a fictitious one, that the cheques must be looked upon as having been made payable to a fictitious person and were therefore payable to bearer.

That would be so if it had been the intention of the plaintiffs to use the name of a fictitious payee. But on the contrary the payees were existing persons with whom the plaintiffs believed they were dealing, and whose endorsement they relied upon having before the cheques were paid. *Phillips v. imThurn*, L. R. 1 C. P. 463, cited by Mr. Kerr, is nothing to the purpose; the defendant there, who accepted for the honour of the drawers, was taken to have had all the knowledge which the drawers

must have had ; and it being admitted that the payee was a fictitious person, it was held that the drawers must be taken to have drawn a bill payable to bearer. As Montague Smith, J., puts it, at p. 472, " The defendant, by his acceptance for honour, admits that the drawers had put their names to that which was to take effect as a negotiable instrument. If, therefore, Carlos Raffo (the payee) was a fictitious person Canevaro & Co. (the drawers), must be taken to have drawn a bill payable to bearer ; and the defendant must be taken to have affirmed that they have done so." That was also the ground of the decision in the well-known case of *Gibson v. Minet*, 1 H. Bl. 569.

Lastly, the defendants rely upon the receipt and certificate given by the plaintiffs when taking up their cheques. I agree with what has been said in the Court below and by my brother Burton in answer to this objection, and will only add, in reference to the suggestion of the appellants' counsel, that the defendants might have been lulled into security and led into paying the last two cheques by reason of the plaintiffs having taken up the first without objection, that for anything which appears to the contrary all the cheques had been presented to and paid by the defendants before the plaintiffs signed the receipt and certificate in question.

I agree that the appeal should be dismissed, with costs.

PATTERSON and MORRISON, JJ.A., concurred.

Appeal dismissed.

MILLER V. HARVEY.

Insolvent Act of 1875, sec. 134—Payment within thirty days to bank of discounted note.

The defendants discounted at a bank a promissory note which A. had given them, and on maturity it was paid to the bank out of A.'s moneys within thirty days of his insolvency.

In an action by the assignee to recover the amount from the defendants as being a payment within sec. 134 of the Insolvent Act of 1875 :

Held, reversing the decision of the County Court, that they were not liable, as the payment was not made to them, but to the bank, who were the actual creditors.

APPEAL from the County Court of Wentworth.

The plaintiff was assignee in insolvency of one Aikine, and he sought to recover from the defendants the amount of a promissory note for \$188.80 made by Aikine, payable to the defendants, and which fell due on 29th January, 1878. The note was made on 23rd November, 1877, in renewal of another which fell due on that day. It had been discounted for the defendants by the Bank of Montreal, being endorsed by the defendants ; and it was paid to the bank at maturity by Mr. Rykert out of moneys payable by him to Aikine for the purchase money of Aikine's business. The insolvency occurred on 12th February, 1878, within thirty days after the payment. The present claim was founded on the 134th section of the Insolvent Act of 1875 which avoids every payment made within thirty days before the insolvency by a debtor unable to meet his engagements in full, to a person knowing such inability, or having probable cause for believing the same to exist.

In answer to questions put by the learned Judge at the trial, the jury found three facts :

1. That the defendants actually received the \$188.80 from the insolvent as his creditors, and received it on 29th January.

2. That at the time the money was paid the insolvent was unable to meet his engagements in full.

3. That at the time the money was paid the defendants had probable cause for believing that the insolvent was then unable to meet his engagements in full.

A verdict was accordingly rendered for the plaintiff, and a rule *nisi* to enter a nonsuit was subsequently discharged. The defendants appealed.

The case was argued on the 21st January, 1881 (a).

Crerar for the appellants. There was no evidence to warrant the finding of the jury that the payment in question was made to the appellants, nor that they had reasonable and probable cause for believing that Aikine was insolvent. But the bill of exchange was received by the appellants from the insolvent in November in satisfaction of a debt then due and payable, and it operated as payment in the same manner as cash would have done: *Hawkins v. Penfold*, 2 Ves. Sr. 550; *Byles on Bills*, 11th ed., 457. If however, payment was made at all by the insolvent in January, it was made to the bank to whom the bill belonged, in which case the Insolvent Act provides no remedy: *Nelles v. Paul*, 4 App. 7; *Botham v. Armstrong*, 24 Gr. 217.

W. F. Walker for the respondent. That the appellants knew that Aikine was in insolvent circumstances when the payment was made is unquestionable, and the evidence fully justifies the finding that the money was paid to the appellants as creditors. The bank was merely their agent to receive the money: *Miller v. Reid*, 29 C. P. 589. That they considered themselves still as creditors of the insolvent is clearly shewn by the evidence, and especially by the letter from one of the appellants, to Mr. Rykert, written after they had discounted the bill, in which they described themselves as *creditors* of Aikine.

March 1, 1881. BURTON, J. A.—No such point as is raised in this case was made upon the argument in *Miller v. Reid*, 4 App. R. 479, nor do I think it could have been given effect to in that case upon the facts.

Reid was a creditor of the insolvent, and the holder of his overdue notes at the time he made the arrangements

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with Rykert, and was then authorized to draw upon Rykert for the amount of two of the notes.

He did in pursuance of those instructions draw through the bank and attached the note to the draft. The draft was never accepted, but was paid on presentation. As I understand the facts in that case, the bank was the mere agent of Reid to receive the payment. It is quite possible, as I suggested upon the argument, that the intention of the 134th section may be sometimes defeated by the payment being made by the insolvent to the bank upon the pressure and at the instance of the creditor, but if any such result follows it is a matter for the legislature and not the Courts to deal with. We have merely to administer the law as we find it. At the time this payment was made to the bank they were the actual creditors as holders of the note; the defendants thereby, it is true, obtained a benefit, as they would have become liable to the bank in the event of non-payment and notice, but the payment was not made to them or to the bank as their agent. The bank had an absolute property in the bills, although the defendants had agreed in the event of non-payment to recoup them. Until then, and the re-acquisition of the bills, the defendants were not entitled to rank upon the estate of the insolvents, nor to take any proceedings to put them into insolvency. A payment made to them with the knowledge they had acquired would have been void within the Act, but a payment to the bank was not, under the circumstances proved in evidence, a payment to them, and on that short ground the action must fail, and this appeal be allowed.

PATERSON, J. A.—The three things necessary to give effect to section 134, and to entitle the assignee to recover back the money were expressly found against the defendants.

They contend, however, that there was no evidence to warrant the first finding, and they appeal against the decision of the learned Judge of the County Court, who dis-

charged a rule *nisi* which they had obtained to enter a nonsuit.

I think the defendants' objection is well founded. The note had been indorsed to the bank, not for collection merely on account of the defendants, but as transferring it to the bank, who paid the defendants its value. The connection of the defendants with it was no longer as owners, or as persons to whom the insolvent was liable, but only as indorsers, liable, if the note was not paid by the maker, to be called on after due presentment and notice to pay the amount to the bank. If that had occurred, and they had paid the bank, they would have resumed their position of creditors of the insolvent, entitled to receive payment of the debt. In the meantime the only creditor who had a right to demand such payment, or who could give a discharge, was the bank. The payment was made to the bank and not to the defendants.

The evidence pressed in argument before us, on the plaintiff's part, and which seems to have caused what appears to me to be the misconception on which the plaintiff succeeded in the court below, shows very distinctly several facts. It shows that the defendants were very anxious that this particular debt should be paid; that Mr. Sterling, one of the defendants, paid more than one visit to St. Catharines, where the insolvent lived, for the express purpose of protecting the interests of his firm, and had there certain interviews, and said and did certain things, which justified the finding that he had probable cause for believing that Aikine was unable to meet his engagements in full; and that, amongst other things, he saw Mr. Rykert and urged him to pay this note; and he joined a Mr. Reid in a letter to Mr. Rykert, in which his firm and Mr. Reid's were described as the two principal creditors of Aikine, and in which they gave a statement of what they called "our respective claims now past due and maturing," in which statement this note was mentioned as one of the claims of the defendants.

All this is no doubt perfectly consistent with the sup-

position that the defendants held the note and wanted Mr. Rykert to pay them the money; but it is proved and not contradicted that they did not hold the note; and all the evidence is equally consistent with the real position; and all their conduct as appropriate to the actual interest they had in respect of their liability as indorsers. It is scarcely sufficient to say the evidence is only equally consistent with the real position, because while Mr. Sterling emphatically denies having spoken to Mr. Rykert of paying money to him, Mr. Rykert agrees with him in stating that what he was asked to do was to pay some bills maturing—not to pay them to the defendants—and he knew the bills were in the bank and paid this one there. Verbal criticism of the evidence is, however, uncalled for in the face of the undenied fact that the bank had paid the money for this note in November, which was the only money paid to the defendants, and that in January the money was due to the bank and was paid to the bank. It is quite true that no payment was made by the insolvent till 29th January, and that neither the making of the note nor the discounting of it was anything in the nature of payment by the insolvent; but the question is, to whom was the payment made on 29th January—a question which seems to me to admit of but one answer.

It is scarcely necessary to say that this treatment of the case does not involve any doubt of the soundness of the ruling that payment to a bank, to whom a bill has been indorsed for collection only, is payment to a mere agent, and is therefore payment to the principal. I do not suppose it was intended by Wilson, C. J., to lay down any broader doctrine than this in that passage of his judgment in *Miller v. Reid*, 29 C. P., at p. 589, to which Mr. Walker called our attention. The defendant in that action was the same Mr. Reid mentioned in the evidence now before us as having called on Mr. Rykert with Mr. Sterling; and the case of *Miller v. Reid*, 4 App. R. 479, was an action to recover the amount of two bills drawn by Reid upon Rykert, each at three days after date, for debts due by Aikine to Mr.

Reid's firm, and paid by Mr. Rykert out of the same fund from which he paid the note now in question. At the trial of that action, before Mr. Justice Cameron without a jury, a verdict was entered for the plaintiff. On a motion against that verdict, the Court of Common Pleas, consisting of Wilson, C. J., and Galt, J., differed in opinion ; and on appeal to this Court the finding at the trial, in which Wilson, C. J., had concurred, was sustained, 4 App. R. 479. The question contested in all the Courts was, whether, under the circumstances of that transaction, the money paid was the money of Aikine or that of Rykert. There is no trace in the judgments delivered by Mr. Justice Cameron, or Mr. Justice Galt, or in this Court, of a discussion of the point on which the present case is now turning. But there is in the judgment of the Chief Justice of the Common Pleas the following passage, at p. 589 : "The defendant is, in my opinion, as much bound to account for the money as part of the estate of the insolvent, although he discounted the draft on Rykert through the bank and got the money from the bank, the bank receiving the money from Rykert on presentation of the defendant's draft to him, as if the defendant had personally received the money from Rykert. There can be no difference between a payment made to the defendant himself and a payment made to his order." Now, as I have said, I do not understand the learned Chief Justice although he used the word "discounted," to mean more than would be conveyed by the words "collected through the bank ;" and, with that explanation I entirely agree in the proposition he lays down. I do not know that those drafts, which were drawn at Hamilton, at three days after date, upon Rykert at St. Catharines, were shown to have been discounted in the sense of being actually negotiated and cashed ; or that they were not merely indorsed before acceptance to the bank for presentation and collection. I imagine they never were accepted, but were paid at once when presented. It is certain that no such circumstance as the negotiation of them was before the attention of this Court.

Before leaving this topic I may be allowed to refer to two or three decisions of Lord Ellenborough in which the distinctions I have been speaking of are very clearly stated. In *Giles v. Perkins*, 9 East 12, we find this language, at p. 14, "Every man who pays bills not then due into the hands of his banker, places them there as in the hands of his agent, to obtain payment of them when due. If the banker discount the bill or advance money on the credit of it, that alters the case; he then acquires the entire property in it or has a lien on it *pro tanto* for his advance." Under the facts in *Giles v. Perkins*, the banker was held to be agent only for his customer, so that on the bankruptcy of the customer his assignee was entitled to the bills.

A different state of facts existed in *Carstairs v. Bates*, 3 Camp. 301. There the bankers discounted bills for one Allport the drawer, credited him with the amount, and debited him with the discount; so that deducting the discount they were placed to his account as cash, which he might immediately have drawn out. The bankers having failed, their assignees in bankruptcy sued the acceptor, who contended, by way of defence, that the bills remained the property of the drawer. Lord Ellenborough said at p. 302: "Is it meant seriously to contest the right of the assignees to recover in this action? The bankers were the purchasers of this bill. They did not receive it as agents of Allport. The whole property and interest in the bill vested in themselves, and they stood all risks from the moment of discount. If the bill had been afterwards stolen or burnt, theirs would have been the loss. In *Giles v. Perkins* the bankers were mere depositaries, with a lien when the account was overdrawn. The customer there drew upon the credit of the bills deposited. Here Allport might have drawn out the amount of the bill, deducting discount, as actual cash, in the same manner as if he had discounted the bill with a third person and then paid in the amount in bank notes. The discount makes the bankers complete purchasers of the bill," &c. All that fits the present case very closely.

The case of *Bruce v. Hurley* 1 Stark. 23, was of the same character, as were also *Hornblower v. Proud*, 2 B. & Ald. 327, and *Thompson v. Giles*, 2 B. & C. 422. In the comparatively recent case of *Denton v. Peters* L. R. 5 Q. B. 477, there are some instructive remarks by Mellor, J., explanatory of the distinction between an indorsement which merely constitutes the indorsee agent of the indorser, and one which passes the property and makes the indorser liable as guarantor.

In the case of a debt or obligation not negotiable under the law merchant, but transferred by virtue of our statute which permits the assignment of a chose in action, or in the case of a bill indorsed without recourse, there would, as I apprehend, be no room to question the status of the transferee as the person forbidden by section 134 to receive payment. Is the case altered because the transferor is an indorser, who has a very substantial interest in procuring payment of the debt to his indorsee? I cannot see my way to treat the statute which avoids a payment, and renders the person to whom it is made liable to pay it back, as including in that result a person who neither by himself or his agent receives the payment, but who by means of the payment is relieved from a contingent liability. The liability upon the paper is to pay in case it is dishonoured by the prior party or parties, and in case due notice is given. That is the indorser's contract, and we have no warrant for varying it by implication to the extent necessary to support the plaintiff's contention.

The bankrupt law of the United States has a clause which will be found at page 810 of Mr. Bump's work, containing provisions analogous to those of section 134, but fuller and more specific, and, amongst other differences, making the value of the payment, pledge, &c., recoverable from the person receiving it, "or to be benefited thereby." Under this latter expression an indorser has sometimes been held liable to pay to the assignee the amount of a bill paid by the bankrupt to the indorsee. I do not gather, however, from the cases I have seen that this interpreta-

tion is received without question. In *Bean v. Laflin*, 5 B. Reg. 333, an indorser was held not within the clause, when he had not taken any active part in procuring the payment to be made. The judgment delivered in that case by Treat, J., in the U. S. District Court in Missouri, contains an able and instructive argument against so construing the general expressions of the clause as to vary by implication the indorser's contract. If I correctly understand the decisions, such *e. g.* as *Ahl v. Thorner*, 3 B. Reg. 118, the ground upon which an indorser is sometimes considered a person to be benefited by a payment, or to furnish evidence that he so considers himself, is the active part taken by him in procuring the payment to be made. We are not concerned, however, with the soundness or unsoundness of the rule of interpretation applied to the clause, because we have no corresponding words in our section 134, which speaks only of the person to whom the payment is made. In *Nelles v. Paul*, 4 App. R. 1, the liability of a surety, who has been relieved by a payment made by the principal debtor within thirty days before his insolvency, to be called on by the assignee to replace the money was discussed. It did not become necessary absolutely to decide the point, but the opinion we then formed, and which was indicated in the judgment delivered, was in accordance with that which I have arrived at in this case. This case is indeed a stronger one on the side of the surety by reason of the contingent character of his liability.

I think we must allow the appeal, with costs.

MORRISON, J.A., concurred.

Appeal allowed.

BLAKE v. KIRKPATRICK.

Contract of hiring—"Practical tanner"—Dismissal—Condition precedent.

The plaintiff agreed with the defendant to serve him as manager of a tannery for six years, the agreement reciting that he was to manage the works, while the defendant was to furnish the capital. He also agreed to disclose to the defendant a secret process of tanning, which defendant was not to use after the agreement, except in connection with plaintiff, and to manufacture the leather according to such process.

The defendant discharged the plaintiff after about seven months, alleging, among other things, that he was not a practical tanner, and that he was not using the secret process, and had not disclosed it to the defendant.

Held, reversing the judgment of PROUDFOOT, V. C., 27 Gr. 86, that the plaintiff was a practical tanner within the meaning of the agreement; and that the manufacture of leather was being carried on according to the secret process, and that as no time was limited for disclosing such process, the defendant, who had never asked for the disclosure, had no right to dismiss the plaintiff for its non-disclosure.

A reference was therefore directed as to the damages sustained by the failure of the defendant to perform his part of the agreement, and for the dismissal.

THIS was an appeal from the decree of Proudfoot, V.C., dismissing the plaintiff's bill, by which he sought to recover damages from the defendant for breach of his agreement to continue him as manager of a tannery. The agreement and the facts are fully stated in the report of this case in the Court below, 27 Gr. 86.

The case was argued on the 17th December, 1880 (a).

W. Cassels, (*Lefroy* with him,) for the appellant. We submit that the Vice Chancellor was in error in coming to the conclusion that the respondent intended to embark in an enterprise in which the tanning was to be effected by means of oak bark. It is quite clear from the evidence of the respondent himself, and from letters written by him before and after he entered into the agreement in question, that he never believed or understood that the tanning should be effected in that way. His whole object and intent was that leather commercially sold as oak leather should be manufactured in a more inexpensive way

(a) *Present*.—BURTON, PATTERSON, and MORRISON, JJ.A., and BLAKE, V.C.

than could possibly be accomplished by the use of oak bark. The fact that the respondent himself purchased the acids and ingredients forming the material for the tanning process, makes it impossible to come to the conclusion that he believed that only oak bark should be used. Moreover the agreement itself is entirely silent as to the method of tanning, and it contains no provision requiring the tanning to be effected with the oak bark. The learned Vice Chancellor was also of opinion that the appellant was not a practical tanner, and that therefore he was not entitled to succeed, but it was clearly proved that he was a practical tanner within the intention of the parties. The respondent was an intimate friend of the appellant and had known him for years. He was also aware that a foreman was required in the tannery, and in one of the letters prior to the consummation of the agreement in question his attention was called to the fact that in the event of Hughes, the then foreman, being dismissed, it would be necessary to engage another foreman. Then the respondent was at the tannery in question, and was well aware that a foreman was employed. It is true that the agreement refers to the appellant as a practical tanner, but it is merely by way of recital, and cannot be construed as a representation that he was a practical tanner. As a matter of fact, however, the evidence establishes that he is a practical tanner.

The agreement in referring to the secret process means that the appellant was to manufacture the leather according to the process theretofore used by him, and the words "secret process" merely referred to the method followed by him during the time he had been managing the tannery in question. It is plain that the appellant had a secret process of tanning within the meaning of the parties. The disclosure to the respondent of this process was not a condition precedent to the performance of the agreement by the respondent, nor to a right of action on the part of the appellant for the non-performance thereof; but it was requisite from the peculiar nature of the stipulation to dis-

close the secret process and it was to be implied from the very nature of it that a request or demand for performance on the part of the respondent should precede the fulfilment of it by the appellant: *Chitty* on Contracts, p. 1071, (Am. ed.); *Radford v. Smith*, 3 M. & W. 254, 257; *Back v. Owen*, 5 T. R. 409; *Seymour v. Gartside*, 2 D. & R. 55; *Topham v. Braddick*, 1 Taunt. 572; *Boody v. Ruland*, 24 Vt. 660; *Daily v. Stevenson*, 5 O. S. 737. The fact that the respondent did not at the time of entering into the agreement demand disclosure of the secret process, or appoint a time for it to be made, but went away without doing so, itself shows that the respondent did not want to hear what the secret process was at that time, but merely desired to bind the appellant to reveal it on demand. It is moreover admitted by the respondent in his examination that he never was in a position to receive a communication from the appellant as to the secret process. It appears in the letter written previously to the making of the agreement that the respondent himself was aware that one Hughes knew of the process in question. We submit that the evidence shews that the appellant carried out the agreement in good faith: that he properly attended to his portion of the agreement: that the present contention was a mere reason set up for the purpose of giving the respondent an excuse for breaking the agreement, and that the appellant should be allowed damages computed on the basis of the profits which he might reasonably have expected to earn had the respondent fulfilled the agreement sued on. They also cited *Gale v. Leckie*, 2 Stark 107; *Sedgwick* on Damages, 6th ed., 104-5; *Bagley v. Smith*, 10 N. Y. 489; *McNeil v. Reid*, 9 Bing. 68; *Smith v. Thompson*, 8 C. B. 44; *Robinson v. Harman*, 1 Ex. 850, 855; *Simpson v. London & Northwestern R. W. Co.*, L. R. 1 Q. B. D. 274; *Fletcher v. Tayleur*, 17 C. B. 21; *Auger v. Cook*, 39 U. C. R. 537.

D. McMichael, Q.C., (Seager with him,) for the respondent. The objections taken by the appellant to the judgment appealed from are mainly as to the finding of the

Vice Chancellor upon the questions of fact, which it is submitted this Court should not disturb, as the learned Judge had the advantage of seeing and hearing the witnesses. These findings are abundantly sustained by the evidence. It was shewn that the respondent was induced to enter into the agreement by false representations as to the profits to be made in the business by virtue of the secret process of which the appellant stated he was possessed, and the representation that he was a practical tanner. The agreement was not a general hiring, but was an agreement that he should be employed as a manager of a tanning business, and the statement that he was a practical tanner was one of the inducements to the respondent to put capital in the business, and engage the appellant to manage it. But it was established beyond all question that he was not a practical tanner, and it is plain that the secret process referred to, if any existed, was not an improvement in the manufacture of oak tanned leather at all, but was a process by which leather tanned with hemlock bark could be so changed in its appearance that it might be sold as oak tanned leather; and that the use of it was injurious to the leather. There is not a word in the agreement or in instructions given by the respondent to the appellant to shew that he intended him to manufacture leather commercially known as oak tanned leather. If no such cheap process was in reality known to the appellant he was guilty of misrepresentation that would avoid the agreement, and if the appellant had any such secret process it was one which would injure the leather in attempting to make it appear what was it not, and was so far a species of fraud; and whether the plaintiff alone knew it, as he contends, or whether both knew that in reality oak tanned leather would not be produced, but only an imitation of oak tanned leather, in either case the Court will not lend its aid to enforce an agreement to carry out such a purpose. The fact that men in the trade knew that it was not oak tanned leather makes no difference if it was intended that the customers generally should be deceived: *Begbie v. Phosphate Sewage Co.*, L. R. 10 Q. B. 491;

Fivaz v. Nicholas, 2 C. B. 501; *Jones v. Yates*, 9 B. & C. 532; *Simpson v. Bloss*, 7 Taunt. 249; *Stronghill v. Buck*, 14 Q. B. 781. Being a servant under the respondent the appellant forfeited all rights to have the contract for hiring enforced when he took possession of the premises and property of the former, and held the same in defiance of and contrary to his will. At the very time the appellant filed the bill he was acting in disobedience of the orders of the respondent and keeping him out of his own property, and it was only under the orders of the Court that he regained possession. They also cited *St. John v. Rykert*, 4 App. 213; *Rice v. Bryant*, 4 App. 545; *Halton Election, Harris v. Barber*, 11 L. J. N. S., 273; *Keena v. O'Hara*, 16 C. P. 435; *Collins v. Blanter*, 2 Wils. 341.

March 26, 1881. PATTERSON, J. A.—We are not embarrassed by any difficult questions touching the honesty or the credibility of witnesses. A careful perusal of the whole evidence has left me with the same opinion of the witnesses which the learned Vice Chancellor has expressed; and I agree with him in his finding of the general facts, which he has stated very fully and very clearly in his judgment. I also agree that the case could not with any propriety be decided against the plaintiff upon the circumstance that what he called oak leather was not leather tanned exclusively or even to any substantial extent with oak, but in fact was principally tanned with hemlock, being made more or less to resemble leather tanned with oak by the use of certain extracts during the process of tanning and of certain acids after the tanning was complete. I do not think the people the leather was sold to were deceived, though possibly the ultimate consumer, who was not in the secret, may have supposed he was getting the genuine article denoted by the name; and I have no idea at all that the defendant did not quite understand that hemlock was to be the main basis of the tanning, and that the process was to produce an article which would sell as what was called in the market oak leather.

But while I agree to this extent with the learned Vice Chancellor, I cannot see my way to adopt the inference he draws that the plaintiff was not, within the meaning of the phrase as used in the written agreement, a practical tanner. The counsel for the defendant is represented to have asked one of the witnesses his opinion on the subject, when the witness very pertinently inquired what he meant by practical tanner. In reply the counsel said "A man who can take hold of the business, take a hide and make leather of it." I think that definition too narrow for the circumstances. The same witness, who after receiving that definition said, "Well, if you mean to manufacture leather of it, I would understand in that sense he was not a tanner," explained in the course of his evidence that when he worked with the plaintiff, the plaintiff was managing the tannery for Thorne and Parsons. The reporter has the words "*under* Thorne and Parsons," but that does not convey the sense, because both Thorne and Parsons shew that the plaintiff was the manager, and that they did not interfere with the tannery at all. The witness further said that he used generally to consult with the plaintiff on matters relating to the tannery; that he understood that the plaintiff took charge of it as any other manager would; that he appeared to have a good deal of knowledge; and that he would not like to say that the plaintiff was not capable of managing a tannery. It is apparent, to me at all events, that the plaintiff was capable of managing a tannery, and that he did manage this one with efficiency. The defendant, who was not in any sense a practical tanner, as far as the evidence shews, but who invested money in several tanneries, required some one capable of managing the work of the manufacture of leather. The other department, viz., financing, buying, and selling, was what the defendant was competent to manage. The recital to the agreement states that the one is a practical tanner and is to manage the tannery, and the other is to put capital in the business of the tannery as thereafter mentioned. The departments of the two

men are thus defined in the introduction; and that definition, and not a representation as to the plaintiff's mechanical skill or manual expertness in the operations of the tannery, is the object of the recital. The defendant had known the plaintiff nearly all his life and had sufficient opportunities for knowing or inquiring into his qualifications. He knew he had been managing this very tannery for years, and if he had been told what Thorne and Parsons and others said in their evidence at the hearing, he would have been told in effect that he was a practical tanner; that is to say, a person capable of managing and of some experience in managing a tannery. I find nothing in the evidence of Hughes, on whom the learned Vice Chancellor relied, and who, from his evidence as I read it, deserved the good character for fairness and candour which he received, to throw doubt on the propriety of holding that the plaintiff was guilty of no misrepresentation in calling himself a practical tanner. All that is shown on the subject by Hughes is, that he never saw the plaintiff doing the practical work, meaning, as I understand him, that he did not see him labouring with his own hands at the beam or handling the hides in the vats; and however what is called theoretical knowledge, or knowledge derived from reading and study, may be undervalued by the mere labourer who knows nothing outside the groove in which he has been trained to work, the imputation of such knowledge will scarcely be taken as weakening the title to be called a practical man. Hughes and others show that the plaintiff applied himself industriously and successfully to the acquisition of such knowledge; and whether they may be right or wrong in their opinions that the plaintiff was not skilled in all the practical operations which leather has to undergo, from having actually performed all those operations himself, he was nevertheless in my judgment a practical tanner within the meaning of the recital.

Neither am I able to take the same view as the learned Vice Chancellor respecting the secret process.

The provisions of the agreement on this subject are the

following: viz. "And the said Blake covenants and agrees with the said Kirkpatrick that he will * * give the proper time, attention, and attendance necessary to the efficient manufacture of leather to be carried on in the said tannery according to his secret process. * * That the said Blake will disclose to the said Kirkpatrick a certain secret process of tanning as used by him in the said tannery heretofore; and the said Kirkpatrick will not at the termination of this agreement, either by effluxion of time or otherwise, use the said process in any tannery directly or indirectly except in connexion with the said Blake or his executors or administrators."

The plaintiff had a process by which the leather tanned wholly or partly by hemlock was rendered lighter in color, and made to resemble oak-tanned leather. This is said to have been by the use of acids after the leather was tanned, and to have been to some extent injurious to the leather, although it added to its saleable value. The plaintiff used the process when he was with Thorne and Parsons. Hughes, who had been with him there, knew of it wholly or partially; and we find the defendant in one of his letters, dated 5th November 1878, warning the plaintiff that Hughes must be disclosing it, and suggesting that by way of detecting him the plaintiff should try to intercept his letters. This was after the agreement was made—its date is 10th October 1878—but some time before they had begun to work under it. The process in question is thus identified, and the force of the word *secret* is shown, as not being understood to imply that it was known only to the plaintiff.

The defendant was unfortunately a sufferer almost from the beginning of the enterprise, from apoplexy and paralysis. The bad state of his health explains, while it does not legally excuse, his failure to perform his part of the agreement by keeping the tannery supplied with stock to work up to its capacity. It accounts also for the fact that he was never, or not more than once, at the tannery, and possibly also for his never having asked the plaintiff to

disclose to him the secret process. The fact is, that he never did ask for it. I can understand that the plaintiff, if he were bringing an action for something the consideration for which was the disclosure of the process, could not excuse its non-disclosure and claim the same reward as if he had disclosed it, by the failure of the defendant to demand it; and I agree with the learned Vice Chancellor that before the defendant could maintain any action for its non-disclosure, a demand on his part would be indispensable. I regard the present case however, as analogous to an action by the defendant, and not to one, such as I have supposed, by the plaintiff. The defendant asserts a right to terminate the agreement and to dismiss the plaintiff, because the plaintiff did not, unasked, communicate the secret. I cannot accede to that contention. The defendant was not even in a position to receive the communication. He was either at Toronto or Clifton, and not at Niagara. He was usually incapable, by reason of ill health, of attending to business. No time was limited for making the communication, therefore the plaintiff was in no default in not making it. The first time it was mentioned between the parties, after the agreement was signed, was in the notice discharging the plaintiff. The defendant could not properly ask for it, and in fact did not ask for it then, because he was bound not to use it except in connection with the plaintiff.

The process which the plaintiff had used when with Thorne and Parsons, and which is identified both by the agreement and by the evidence as that intended and understood to be continued in use, was so continued. The leather was manufactured according to it. It has been urged that it was not a *process of tanning*, because its operation added nothing to the quality of the leather, but, while it lightened the color, tended to extract the tannin and so leave the leather less perfectly tanned than before it was used. It will be remembered that the direct agreement is to *manufacture leather* according to the secret process; it is called a *secret process of tanning*, only in the

clause that stipulates for the disclosure of it; and then it is the subject of the further description "as used by him in the said tannery heretofore," which identifies the process they were dealing about. But after all, though the expression "process of tanning" may strictly mean nothing more extensive than the means by which the tannin is transferred from the bark to the hide, it is obviously used in this agreement, as it is popularly used, as synonymous with "manufacture of leather." The course of the examination of witnesses on the part of the defendant in this case illustrates this very well, for it is directed to show that the plaintiff is not a practical *tanner*, by questioning his ability to inspect hides efficiently, and to do other things, such as soaking them or working at the beam, which, while necessary steps in the process of converting hides into leather, are only preparatory to the actual tanning. Within the obvious meaning of the parties the "manufacture of leather was carried on according to his secret process"; and that process was what the plaintiff undertook to disclose as "a certain secret process of tanning as used by him in the said tannery heretofore."

I do not think the dismissal of the plaintiff has been justified, and I am of opinion that he is entitled to an enquiry as to the damages sustained by the failure of the defendant to perform his part of the agreement, and for the dismissal.

We should therefore, in my opinion, allow the appeal, with costs.

MORRISON, J. A.—I am also of opinion that this appeal should be allowed. I cannot see that the words "practical tanner," as recited in the agreement, meant more than that the plaintiff understood or had a practical knowledge of the business, and of the processes used in the manufacture of leather; and they were I think introduced into the recital as prefatory to the duties the plaintiff was to perform as manager of the tannery. I cannot construe those words in the recital as a representation that the plaintiff had, for

instance, served an apprenticeship to the business, that he had gone through all the operations of cleaning, scraping, or tanning hides preparatory to the tanning process in the vats; all that was understood being that the plaintiff had a practical knowledge from actual experience, observation, and reading, which he had acquired during the ten years he carried on the business himself, and as manager for Thorne & Parsons of the tannery in question.

The agreement itself refers to the plaintiff's manufacturing according to the process of tanning used by him in the same tannery theretofore.

I can well understand an intelligent man who carried on a tannery, or was employed superintending the manufacture of leather from the hide for a number of years, as this plaintiff did, becoming a thorough practical tanner, and fully qualified to oversee and determine whether workmen are doing their respective duties, and fully understanding the mechanical process of converting hides into leather, from the beginning to the end, without such person ever having cleaned, stripped, or beamed a hide with his own hands, preparatory to its immersion into the tanning liquor. And I have little doubt, as the plaintiff swore, that he could take raw hides and put them right through, *i.e.*, convert them into leather.

Tanning is both a mechanical and chemical process, particularly the latter, which may be improved by the progress of chemical science, a knowledge of which can only be acquired from experiments and reading.

As I understand it several modes are followed with a view to the hastening of the tanning process, to save time in saturating or impregnating the fibres of the hide with tannin, the astringent principle derived from the bark of various trees. If the plaintiff had covenanted in express terms that he was a practical tanner, in my opinion there is abundance of evidence, and particularly in the plaintiff's correspondence, to support such an allegation. One thing is clear, that the leather he had an opportunity under his management of making was of a good quality. Through

all the correspondence not one word of complaint is made or suggested by the defendant as to the qualification of the plaintiff, or his want of practical knowledge to perform the duties he agreed to. I may here remark that the plaintiff and defendant were intimately acquainted with each other. The latter, who was also in the tanning business, well knew that the plaintiff had carried on the business, and that he had been the manager for Thorne & Parsons of Toronto, under an agreement like the one in question. He had therefore the best means of ascertaining the plaintiff's knowledge and qualifications to perform the duties he contracted to do. Looking at the correspondence and the evidence, I am strongly impressed that this objection, as well as the other objection relative to the secret process were entirely after-thoughts suggested to the defendant, who on account of his ill health had determined to put an end to the contract with the plaintiff. As to the objection that the plaintiff never disclosed to the defendant his secret process, I quite concur in the view taken of it by my brother Patterson. Whatever the process may be, it is remarkable that the defendant never expressed any desire, or made any request (as he admits) that the plaintiff should impart it to him. From the evidence it was apparently some chemical mixture, and it appears that the plaintiff did prepare ingredients himself for the purpose of being applied to the liquor in the vats in which the hides were placed. The evidence further shows that the leather produced was of a reasonably good quality, and would sell as oak leather, and at fair prices.

On the whole I am of opinion the plaintiff is entitled to our judgment.

BLAKE, V. C.—I concur in the judgment of Mr. Justice Patterson. I think the plaintiff is entitled to a declaration that he was wrongfully dismissed by the defendant, and that at the time of such dismissal he was entitled to a specific performance of the agreement in the bill set forth; that there should be a reference to the Master to ascertain what

damages, if any, have been sustained by the plaintiff by reason of the defendant not having performed the agreement on his part. I think the costs up to the hearing and of this appeal should be reserved until the hearing on further directions, as the report of the Master, finding on the question of damages, will aid in the disposition of this question.

BURTON, J.A., concurred.

Per Curiam.—Appeal allowed, with costs.

HARRISON V. PINKNEY.

Lease—Proviso for determination—Option to pay for crops—Construction.

By a lease from one D. to the plaintiff it was provided that if D. sold the farm the plaintiff should give up possession upon receiving six months' notice before the 1st of April, and that he should have the privilege of harvesting and threshing the crops of the summer fallow, or the work done on said fallow should be paid for at a reasonable valuation. D. afterwards sold to the defendant, and in August the plaintiff received the stipulated notice after he had prepared the summer fallow but before he had sown it. He afterwards sowed it with fall wheat, and gave up possession on the 1st of April. Neither D. nor the defendant elected to pay for the crop, and the defendant converted it to his own use.

Held, affirming the judgment of the Queen's Bench, 44 U. C. R. 509, that the true construction of the provision was, that the plaintiff was to have the privilege of harvesting any crops which might have been put in on the summer fallow, unless D. elected to pay for them at a valuation: that he had never parted with the property in the crop, and that he was therefore entitled to recover in trover against the defendant.

Per PATTERSON, J.A.—If the lessor intended to pay for the work, he was bound to elect to do so when he gave the notice, or at the latest, when he resumed possession.

APPEAL from the Court of Queen's Bench.

This was an action of trover for certain wheat. The defendant pleaded not guilty, and a denial that the goods were the plaintiff's, upon which issue was joined.

The facts were shortly as follows: One Dunn had demised a farm to the plaintiff for three years from the 1st of April, 1877, by a lease which contained the following provision:

"And the said lessee agrees to give up possession of said premises before expiration of lease, if sold by said lessor, upon receiving six months' notice, said notice to be given before the 1st April

* * * And should said lessor give the said lessee notice to quit premises during any year of said lease, then the lessee to have the privilege of harvesting and threshing the following crop of the summer fallow, or the work done on said fallow will be paid for at a fair and reasonable valuation."

On the 22nd of August, 1877, Dunn notified the plaintiff that he had sold the premises to the defendant, and that possession would be required on the 1st of April

following, and on the 1st April, 1878, Dunn conveyed in fee to the defendant.

When the plaintiff received the notice he had prepared the summer fallow but had not sown any wheat. He subsequently sowed the wheat, and gave up possession on the 1st of April, when defendant entered.

In the summer he reaped the crop, but the defendant converted it to his own use, whereupon the plaintiff brought this action. Neither Dunn nor the defendant had offered to pay the plaintiff for his work.

The case was tried before Morrison, J.A., and a jury.

It was objected that the plaintiff could not recover: that the action should have been against Dunn; and that the plaintiff had notice before he sowed the wheat.

The learned Judge reserved the question of liability for the Court, and the jury assessed the damages at \$207, for which a verdict was entered. Afterwards a rule *nisi* to enter a nonsuit or verdict for defendant was discharged. From this decision, reported in 44 Q. B. 509, the defendant appealed.

The case was argued on the 17th of January, 1881 (a).

Tilt, for the appellant. The whole question is as to the meaning of the covenant, and we submit that the construction placed upon it by Mr. Justice Cameron is the correct one. Under the deed to the appellant, which contained no reservation of the crops, the property in the wheat passed to him, and the respondent cannot therefore recover in trover: *Wood v. Lang*, 5 C. P. 204; *Murton v. Scott*, 1 C. P. 481. The only right of action the respondent has is against Dunn on his covenant, as the lease was not one under the statute, and does not extend to his assigns: *Grey v. Cuthbertson*, 2 Chitty 482. The notice of sale was given to the respondent before the crops were sown, and under such circumstances the intention was that he was merely to be paid for the work done. That

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this was the case is shewn by the words, "will not seed down the summer fallow," which were first used, but afterwards erased; and it was proved that there was an exercise of the option to pay for the work done by the appellant. He also cited *Cowling v. Dickson*, 5 App. R. 549.

Robinson, Q. C., for the respondent. In construing the clause in question the surrounding circumstances must be considered in order to determine what the intention of the parties really was. By the terms of the lease the respondent was liable for the rent up to the termination of the six months, and under such circumstances it would have been most unreasonable to have obliged him to desist from putting in his crops and realizing the benefit therefrom. The argument of the counsel for the appellant founded upon the erasure in the provision is wholly untenable. The explanation which most readily suggests itself, in view of the facts, is, that the respondent objected to so unreasonable a stipulation. The option to pay for the crops or the summer fallow was clearly intended to be exercised by the lessor, and at a time prior to the wheat being sown or reaped, and not having been so exercised the respondent was entitled to harvest the crop. Under the lease it must be held that the respondent had after the first of April a continuing term in the land until the removal of the crop. This is not an action on the covenant, and the question as to whether the assignee is bound does not arise.

March 26, 1881. BURTON, J. A.—I think the verdict should not be interfered with. The language of the lease is not very intelligible, and we are not aided much by the evidence, but it is clear at all events that the landlord was not to be entitled to possession until the expiration of the six months' notice of his intention to terminate the lease.

The original lease was produced at the hearing, and the following words appear to have been written in the clause which relates to the compensation of the tenant in

the event of such notice being given, and to have been subsequently erased: "Will not seed down the summer fallow." So that the clause with these words added would have read: Should the lessor give notice, then the lessee will not seed down, &c.

Upon this the defendant founds an argument, that the intention of the parties was, that if the notice were given before the crop was put in the tenant was to refrain from putting in any; if after, then he was to be paid for it or to be allowed to reap it; but it is I think more reasonable to infer, bearing in mind that the tenant was to pay rent till the first of April, when the notice would expire, that he objected to any interference with his rights to use the property as he thought proper while he was paying rent for it.

It is clear that the landlord desired in the event of a sale to be in a position to give the purchaser full possession of the whole if he desired it, and this he endeavoured to effect under the clause in question.

The proper construction of that clause is, I think, that the tenant is to have the privilege of harvesting any crops which may have been put in on the summer fallow, unless the landlord elects to pay for them at a valuation.

The crops then being the property of the tenant how has he lost them? He has not been paid, nor has any offer been made to pay for them at a valuation.

He has given up possession, as he was bound to do, of the rest of the farm, but he has not parted with his right to the crops. One of the terms of the lease was, that although it might be terminated, the tenant should still be entitled to the crop in the ground at the time of its termination. It is clear, therefore, that it was not the landlord's to sell, and the defendant acquired no right to it, and was a trespasser in removing it.

The argument addressed to us in reference to the covenants was beside the question.

I am of opinion that the appeal should be dismissed, with costs.

PATTERSON, J. A.—I agree with the majority of the Judges in the Court below.

The plaintiff had a lease from Dunn of the farm for three years from the 1st of April, 1877. In the autumn of 1877 he sowed wheat on the farm, and in the following summer he reaped the crop, but the defendant carried away the crop, and converted it to his own use. The onus is clearly on the defendant to justify his act. He attempts to do so by showing that Dunn, the lessor, conveyed the land to him in April, 1878, and he relies on that conveyance as carrying with it the crop which was in the ground. It is obvious that this contention will avail him nothing, unless the plaintiff's term has in some way been got rid of. The defendant accordingly points to the following stipulations in the lease:

"And the said lessee agrees to give up possession of said premises before expiration of lease, if sold by said lessor, upon receiving six months' notice, said notice to be given before the 1st of April.

"And should the said lessor give the said lessee notice to quit premises during any year of said lease, then the said lessee will have the privilege of harvesting and threshing the crops of the summer fallow, or the work done on said summer fallow will be paid for at a fair and reasonable valuation."

And he shows that on the 22nd of August, 1877, the same day on which Dunn agreed to sell the farm to the defendant, Dunn gave the plaintiff the six months' notice to deliver possession on the first day of April, 1878. But it also appeared that neither Dunn nor the defendant ever offered to pay the plaintiff for the work done by him on the summer fallow where the wheat grew, and which had been ploughed before the notice to quit.

It is, to my apprehension, very clear that if the lessor elected to pay for the work in place of leaving to the lessee the privilege of harvesting the crop, he was bound to do so either when he gave the notice or when he resumed possession. From April to August the crop must

have belonged either to the lessee or the vendee. It could not be in a state of suspense without risk of the crop going uncared for during all the spring and summer. The ownership was to be decided by the lessor, and, as I think, necessarily, at latest, when he resumed possession. When the plaintiff tells us that he sent the boys the same time as any other year to see if there were any weeds in it, he shews that he recognized the necessity for the care belonging to some one, and I think he judged correctly that it belonged to him because the crop was his.

The result, in my judgment, is, that the condition on which the plaintiff surrendered possession was that, as to the crop and the field in which it grew, the estate remained in him under the lease, and was not superseded by the deed made by Dunn to the defendant.

I agree that we should dismiss the appeal, with costs.

PROUDFOOT, V.C., and OSLER, J., concurred.

Appeal dismissed.

GAUTHIER V. THE WATERLOO MUTUAL INSURANCE
COMPANY.*Insurance—Further insurance—Mistake.*

The plaintiff, who was insured in the defendants' company under a policy containing a condition that the "Company is not liable * * if any subsequent insurance is effected in any other Company, unless and until the Company assent thereto by writing signed by a duly authorized agent," effected an insurance with the Mercantile Insurance Company, which was void at their option on account of a similar condition, the policy with the defendant not having expired as a matter of fact, though the plaintiff was led by the agent of the other Company to believe it had.

Held, affirming the judgment of the Queen's Bench, (44 U. C. R. 490,) that the plaintiff could not recover, for the insurance in the Mercantile Company, being not void, but only voidable, was a subsequent insurance within the meaning of the condition.

APPEAL from the Queen's Bench.

In an action by the plaintiffs on a policy of insurance, the defendants pleaded a statutory condition endorsed on the policy, which provided that the company should not be liable for loss if any subsequent insurance was effected in any other company unless and until the company assented thereto by writing, signed by a duly authorized agent.

It appeared that the agents of the Mercantile Insurance Company had induced the plaintiff, who was an illiterate man, to believe that his policy in the defendants' company had expired, and persuaded him to effect an insurance in the Mercantile company. The agent gave the plaintiff an interim receipt which bound the company for thirty days, before the expiry of which the premises were destroyed by fire. Afterwards the plaintiff discovered that the policy in the defendants' company had not expired, and accordingly withdrew his application and gave up the interim receipt of the Mercantile.

The case was tried at Sandwich, before Morrison, J. A., without a jury, and a verdict was rendered for the plaintiff.

Afterwards a rule *nisi* to enter a verdict for the defendants was made absolute. The case is reported 44 U. C. R. 490 where the facts are fully stated.

The appeal was argued on the 17th January, 1881 (a).

Crickmore and *Pegley* for the appellants. The condition endorsed upon the policy was not, under the circumstances, violated by what took place between the appellant and the agents of the Mercantile Insurance Company. It is clear that the appellant never intended to effect a second insurance; what was done was purely through the misrepresentation of the agents, and not by or through any design on the part of the appellant to increase the risk. Being a mistake, it should not be held to release the respondents from liability: *Jackson v. Massachusetts Mutual Ins. Co.*, 23 Pick, 418; *Philbrook v. New England Mutual Fire Ins. Co.*, 37 Me. 137; *Atlantic Ins. Co. v. Goodall*, 35 N. H. 328. Inasmuch as the appellant was illiterate, and unable to examine his own papers or to detect such false representation by any examination he could make, it ought not to have been adjudged that the condition in the policy had been violated: *Westfall v. Hudson River Fire Ins. Co.*, 2 Duer N. Y. 490; *Story's Eq. Jur.* 1316, sec. 39; *Armstrong v. Turquand*, 9 Ir. C. L. 48, 49; *Hendrickson v. The Queen Ins. Co.*, 31 U. C. R. 547. But there was, in fact, no valid insurance in the Mercantile, as their policy contained a condition similar to the one in question here, which provided that if there was any other insurance on the property which was not disclosed the policy should be void. Such being the case, the condition in the policy sued on has not been broken: *Gale v. Belknap County Ins. Co.*, 41 N. H. 170; *Hubbard v. Hartford Fire Ins. Co.*, 33 Iowa 325. The policy in the Mercantile was also void by reason of the premium not having been paid in cash: *Johnson v. Provincial Ins. Co.*, 27 C. P. 464; *Goodfellow v. Times, &c., Ins. Co.*, 17 U. C. R. 411; *Walker v. Provincial Ins. Co.*, 7 Gr. 137, 8 Gr. 217; *Montreal Ins. Co. v. McGillivray*, 8 W. R. 165; *May v. The Standard Ins. Co.*, 5 App. R. 605; *Ballagh v. Royal Ins. Co.*, 44 U. C. R. 70, 5 App. R. 87.

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W. H. Bowlby for the respondents. The replication alleges that the appellant "*did not in fact* and never intended to effect another insurance," &c. Without the words in italics the replication would have been demurrable. But the evidence shews clearly a binding insurance in the Mercantile Insurance Company upon which the appellant could have recovered. There was at all events an insurance in fact, and the Courts will not decide upon the validity of the subsequent insurance in this action, to which the Mercantile Insurance Company is not a party: *Mason v. Andes Ins. Co.*, 23 C. P. 37; *Ramsay Woollen Cloth Co. v. Johnstown District Fire Ins. Co.*, 11 U. C. R. 516; *Hatton v. Beacon Ins. Co.*, 16 U. C. R. 316; *Bruce v. Gore District Mutual Ins. Co.*, 20 C. P. 207; *Weinaugh v. Provincial Ins. Co.* 20 C. P. 405; *Dickson v. Provincial Ins. Co.*, 24 C. P. 157. No ignorance or mistake on the part of the plaintiff can excuse the fact of the breach of the condition: *Dafoe v. Johnstown District Ins. Co.*, 7 C. P. 55; *Parsons v. Standard Ins. Co.*, 4 App. R. 326. The subsequent insurance was a breach of the statutory condition pleaded, and of sec. 39 of the Mutual Insurance Act R. S. O. ch. 161. The forfeiture worked thereby is therefore a penalty imposed by statute, and in such a case the Courts will not interfere to relieve against or waive the forfeiture: *Story's Eq. Jur.* sec. 1326; *Merritt v. Niagara District Ins. Co.*, 18 U. C. R. 529. The appellant has recognized the validity of the insurance in the Mercantile Insurance Co. by receiving payment of moneys upon insurances effected on the same occasion and paid for in the same way as the subsequent insurance in the Mercantile here complained of, and he cannot now be heard to dispute its validity. The decision in *Ballagh v. Royal Mutual Ins. Co.*, 5 App. R. 87, is of no force in this case, because the statutory condition relied on is here a condition of the policy by express agreement of the parties. The body of the policy sued on contains the following words:—"Provided always that this policy and this insurance shall at all times and under all

circumstances be subject to the conditions printed on this policy with the respective headings of 'Statutory Conditions,' and 'Variations in Conditions.'" The condition in question is printed on the policy sued on herein, under the heading "Statutory Conditions," and so becomes a condition of the policy independently of the Uniform Conditions Act. It cannot be contended that this condition is not just or reasonable, and the defendants have clearly the right to stipulate for it in addition to the defences given them by the Mutual Insurance Act: *Butler v. Waterloo Mutual Ins. Co.*, 29 U. C. R. 553. The 39th section of the Mutual Insurance Act, R. S. O. ch. 161, makes the plaintiff's policy void if an insurance subsist in any other office at the same time without the consent of the defendants' directors, and this being a public Act the Courts will take cognizance of it, since the fact of the double insurance is alleged in the second plea; and if not sufficiently pleaded to enable the defendants to avail themselves of the defence under this section, an amendment should be allowed for that purpose; and also (if necessary) an amendment should be allowed to enable the defendants to set up the fact that the eighth statutory condition printed on the policy is made a condition of the policy by express agreement of the parties. The judgment of the Supreme Court in *Parsons v. Standard Ins. Co.*; is not in point here. In that case there was no increased or further or additional insurance, but simply a change in the name of the company carrying one of the concurrent insurances. He also referred to *Dickson v. Provincial Ins. Co.*, 24 C. P. 169; *Stickney v. Niagara District Ins. Co.*, 23 C. P. 372; *Fair v. Niagara District Ins. Co.*, 26 C. P. 398; *Jacobs v. Equitable Ins. Co.*, 17 U. C. R. 35; *Hendrickson v. Queen Ins. Co.*, 31 U. C. R. 547; *McCrea v. Waterloo Mutual Ins. Co.*, 1 App. R. 218; *Shannon v. Gore District Ins. Co.*, 2 App. R. 396; *White v. Lancashire Ins. Co.*, 27 Gr. 61, 44 U. C. R. 490; *Billington v. Provincial Ins. Co.*, 2 App. R. 258.

March 26, 1881. BURTON, J. A.—I have approached this case with an anxious desire to assist the plaintiff if possible against what I consider to be a most unrighteous defence, and I regret that a company, which so far as I am aware has conducted its business creditably, should have felt itself justified in setting up a defence of the kind when no fraud was contemplated, and no possible injury could be sustained by the defendants in consequence of the act of the plaintiff.

The defendants set up and rely upon a condition in their policy to this effect.

"This company is not liable for loss * * * if any subsequent insurance is effected in any other company unless and until the company assent thereto by writing signed by a duly authorized agent;" and allege a subsequent insurance in the Mercantile.

The defendants join issue on this plea, and also reply equitably, on grounds to which I shall presently refer.

But upon the first issue joined the plaintiff seeks to excuse himself from a breach of the agreement, by alleging that the policy in the Mercantile was void by reason of a similar stipulation or condition contained in that policy, that in case the insured shall have already any other insurance on the property not notified to them, that insurance shall be void and of no effect.

I see no evidence upon this appeal book that in point of fact the policy in the Mercantile did contain such a stipulation. The exhibits are not printed as they should have been. I have sent for the original exhibits put in at the trial, and find that two of them are missing, and it is quite possible that one of them was a copy of the policy in use by this company; but the case was argued as if that fact had been established; but even so, I do not think it would assist the plaintiff.

I find a number of American decisions, in addition to those cited on the argument, which appear to bear out the contention of the plaintiff, but they proceed upon a ground which I think is not tenable namely that the

second insurance is absolutely void and never had any legal existence. It appears to me that in assuming that position they lose sight of the fact that this stipulation was made for the benefit of the Mercantile company and that it was competent for that company to waive it. The policy, by reason of the omission to mention the previous insurance, was not *ipso facto* void but voidable only at the option of the company. It may be that if notified of it they would have continued the insurance. It is true they cancelled or attempted to cancel it but this was after the fire had occurred, which had doubtless more to do with the cancellation than the ascertainment that there was another insurance.

But the agreement between the parties to this suit was that they were not to be liable if any subsequent assurance was effected.

It would be no answer to allege that the other insurance might be legally resisted. The validity of the defendants' contract, or their obligation to pay upon it, was not to depend upon whether the subsequent insurance was finally to be adjudged valid or invalid.

It being competent to the Mercantile at any time to elect to hold the policy a valid one the answer of the plaintiff fails in accordance with various judgments in our own Courts, which were in my view rightly decided, that such a stipulation as this was designed to apply to all cases of policies subsequently existing in point of fact, without reference to their validity or effect.

I think the equitable replication is not sustained in evidence, and would have been bad on demurrer had it omitted the words, "did not in fact make." It is not correct to say that the plaintiff never intended to effect another insurance. He fully intended to effect it, but would not have done so had it been present to his mind that the previous insurance had not expired.

Being of this opinion it is not necessary to consider the second defence; but on the one upon which the plaintiff fails, the defendants would, I think, have best consulted

their own interest had they acted upon the report of their own agent, who intimated that he considered it a just and proper claim that should be paid. In that I entirely agree, but the defendants have a right to insist on the "condition of the bond," and are entitled therefore to hold the judgment in their favour.

This appeal must consequently be dismissed, with costs.

PATTERSON, J. A., PROUDFOOT, V. C., and OSLER, J.,
concurring.

Appeal dismissed.

DUFF v. CANADIAN MUTUAL INSURANCE COMPANY.

Mutual Ins. Co.—Separate branches—Liability of branches to contribute to repay guarantee stock—36 Vic. ch. 44, O.

The defendants, a mutual insurance company in existence at the time of the passing of the Mutual Insurance Companies' Act of 1873 (36 Vic. ch. 44, O.) had divided their business into several branches, and had also raised a guarantee capital fund, out of which the losses in all the branches as they arose were paid. The by-law for raising the guarantee fund, passed on the 12th January, 1874, contained a provision that from the surplus profits of the company from year to year, and by assessment on premium notes a reserve fund should be created for the purpose of paying off the guarantee capital.

In a suit by a creditor to realize the assets of the company, it appeared that the amounts to be collected on the premium notes in two branches would not suffice to pay the losses in those branches, and that the amounts to be collected on such notes in the other two branches were sufficient for that purpose.

Held, by PROUDFOOT, V.C., on appeal from the Master, that the policy-holders in the solvent branches were liable to be assessed on their premium notes for the purpose of paying off the liability due to the guarantee stockholders so far as might be necessary to discharge losses paid in those particular branches from the guarantee fund.

Held, on appeal to this Court, that whatever might be the power of the directors, the Court of Chancery had no jurisdiction to make the assessment.

Quere, per BURTON, J.A., as to the effect of sec. 75 of R. S. O. ch. 161, and its inconsistency with the clauses of the Act relative to branches and the exemption of members of one branch from liability for claims on another.

This was an appeal by certain guarantee stock-holders in the defendants' company against so much of the order of Proudfoot, V. C., of the 18th March, 1880, as vacated or varied an order made by the Master at Hamilton, dated the 29th January preceding, in these words :

"That the policy-holders in the Hydrant and Country branches are liable to be assessed on their premium notes in order to repay the amount paid in, and to be paid in on the guarantee capital stock ; but for that purpose they are only liable to be assessed to the extent of ten per cent. per annum for each year originally covered by their policies."

The Vice-Chancellor held that they were not so liable in respect of any sums paid for losses appertaining to other branches, but merely for the balance, if any, which might be found due from them respectively for moneys

advanced from the fund for payment of losses, debts, and expenses, in their respective branches: in other words to pay the assessments which must have been made to pay the loss if it had not been paid from the guarantee fund.

The facts are fully stated in the judgment of Burton, J. A., and in the report of the case in the Court below, 27 Gr. 391.

The case was argued on the 14th December, 1880.

E. Martin, Q. C., for the appellants. By the terms of the by-law creating the guarantee capital stock, a debt against the company is created irrespective of any subdivision of the company into branches; and it is provided that this debt shall be paid off by an assessment on all the premium notes and undertakings of the company, without any reference or restriction as to branches or to the manner in which the guarantee fund may be applied: C. S. U. C. c. 52 sec. 31; 27 & 28 Vic. c. 38 sec. 6; *Beaver, &c., Mutual Ins. Co. v. Spires*, 30 C. P. 304, 328, 329, 330. There is no evidence to warrant the finding of the Vice-Chancellor that the Hydrant and Country branches had repaid the guarantee fund all losses in those branches which were paid from it. The effect of the judgment appealed from is to wholly extinguish the liability of the company, and substitute therefor a shifting claim against each branch, to the payment of whose losses the directors may choose from time to time to apply the moneys received from the guarantee stock, and this without the guarantee stock-holders having any control whatever over the directors; so that, where there are solvent branches and a bankrupt branch, the directors could use the guarantee capital to pay losses in the bankrupt branch only, and thus deprive the stock-holders of all remedy, though the company itself and all other branches were solvent. If an assessment were made on the premium notes in every branch of the company to pay off the guarantee capital, under the by-law, before any losses had been sustained by

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the company, payment thereof could be enforced under the contract created by the by-law, and it would be no answer to such assessment to show that no losses had then actually been sustained by the company. The case of *Beaver, &c., Mutual Ins. Co. v. Spires*, 30 C. P. 304, relied on by the Vice-Chancellor, is not at variance with the finding of the Master, but on the contrary supports it; for while the defendants in that case were held not liable for the debentures, they were held liable for the guarantee stock. The moneys raised from the guarantee stock constitute a debt of the company, payable as part of its general liabilities. The policy-holders in the Hydrant and Country branches are now insisting on the balance yet due on the guarantee stock being paid in and applied in discharge of these general liabilities of the company, for which these policy-holders are clearly liable to be assessed, and yet the order appealed from exempts these policy-holders from liability to repay the guarantee stock for moneys paid or to be paid in, except for the proportions of losses, debts, and expenses of each branch.

He also referred to *Ex parte Griffin, In re Adams*, L. R. 12 Chy. D. 480; *In re Albion Life Assurance Society*, L. R. 15 Chy. D. 79; *In re National Ass. Co.*, L. R. 10 Chy. D. 118; *Norris v. Caledonian Ins. Co.*, L. R. 8 Eq. 127; *In re London Marine Ins. Co. Association*, L. R. 8 Eq. 176.

Duff, for the plaintiff. The reasons advanced by the counsel for the appellants clearly shew that this appeal should be allowed. The several branches of the company have no separate corporate existence, and all contracts are entered into with the whole company as incorporated, and all the premium notes of the company, irrespective of what branches they are in, are liable to be assessed for such amounts as will be sufficient to realize enough to pay all the general liabilities of the company contracted during the currency of the policies for which such premium notes were given.

Osler, Q. C., R. Martin, Q. C., and Wm. Laidlaw, for the respondents, the Hydrant and Country branches. Un-

less the finding of the Vice-Chancellor is right, the Hydrant and Country branches would, in effect, be paying the debts of the other branches, contrary to the Statute 36 Vic. c. 44, secs. 46, 60, 61, 62 and 63. The guarantee fund was created merely for the purpose of loaning to the branches in anticipation of assessments to be made, which assessments were applicable when received towards repayment of the loan made : C. S. U. C., c. 52, ss. 31, 32 & 33 ; 27 & 28 Vic. c. 38, s. 6 ; 36 Vic. c. 44, ss. 70 & 71, O. The guarantee fund has been lent out to the insolvent branches, and to assess the whole of the premium notes to make good the losses paid in the Commercial branch is contrary to the direct statutory enactment, that one branch shall not be liable for the losses incurred in any other branch : *Allen v. Winne*, 15 Wis. 123 ; *Judkins v. Union Mutual Fire Ins. Co.*, 39 N. H. 172 ; *Sands v. Shoemaker* 2 Keyes, N. Y. 268 ; *Beaver, &c., Mutual Ins. Co. v. Spires*, 30 C. P. 304. The premium notes were not general assets of the company eligible for general payment of debts, but assets only, liable to assessment for the respective losses in the several branches as they arose, with a sufficient addition to cover the proportion of expenses of management : 36 Vic. ch. 44, s. 60, O. There was no debt created by the issue of guarantee stock. The guarantee stockholders have no right of action either by contract or statute as against the company ; they are mere stockholders, having a voice in the management of the company and statutory provisions for the repayment of the moneys. The by-law for the issue of the stock does not provide for its repayment by way of loan, and no pledge was created in favour of such shareholders under the powers conferred by 27 & 28 Vic. c. 38, s. 6 ; *Savage v. Medbury*, 19 N. Y. 32 ; *Devendorf v. Beardsley*, 23 Barb. N. Y. 656 ; *Lawrence v. Nelson*, 21 N. Y. 158 ; *Lawrence v. McCready*, 6 Bosw. N. Y. 329. They also cited *Green v. Beaver, &c., Mutual Ins. Co.*, 34 U. C. R. 78 ; *Beaver, &c., Mutual Ins. Co. v. Trimble*, 23 C. P. 252 ; *Orr v. Beaver, &c., Mutual Fire Ins. Co.*, 26 C. P. 141 ; *Ashbury Railway Carriage Co. v.*

Riche, L. R. 7 H. L. 650; *Howe Machine Co. v. Walker*, 35 U. C. R. 37.

J. M. Gibson, for the company.

March 26, 1881. BURTON, J. A.—The case is a very complicated one, but the facts are very fully and clearly set forth in the statement of the learned Master accompanying his report. In order to arrive at a conclusion it has been necessary to examine the various Acts affecting these companies from their establishment in 1836; and they do not certainly furnish very satisfactory models of legislation; on the contrary, they appear to have been amended and re-amended from time to time apparently to suit the views of the managers of particular companies until the system of Mutual Insurance has entirely disappeared, nothing remaining but the name.

In the original organization of these companies, by 6 Will. IV. ch. 18, the object aimed at, as the name implies, was to enable the members to associate together, not for the purposes of profit, but for the purpose, in the mode pointed out in the Act, of insuring each other's property; each member depositing his promissory note for the premium, *a sum not exceeding five per cent. of which was payable in cash* for the purpose of discharging incidental expenses, and the remainder as required for the payment of losses or other expenses, the note being given up at the end of the term of insurance on the losses sustained during that time being ascertained, and the proportion assessed in respect of it paid. So that the assured would not only receive a return of his note, but, as I gather from the 15th section, any balance which might inadvertently have been levied in excess of the requirements to meet losses or expenses. It would follow that if the provisions of the Act were strictly adhered to there could never be any moneys on hand in the shape of surplus profit for the purpose of a reserve fund, which we find introduced in the subsequent enactments. The leading principle of the Act was, that no payment, with the exception of the first cash payment for expenses, should be made until the occurrence and ascer-

tainment of a loss, and that the assessment then made should be confined to that loss. The companies were in fact then, and for many years subsequently, mere associations for mutual protection, until in an evil hour the Legislature was prevailed upon to grant special charters to individual companies, authorizing them to carry on business both on the mutual and proprietary systems, an innovation which led eventually to a change in the general law regulating these companies which has been attended with most disastrous consequences to the public, and has given rise to an enormous amount of litigation in endeavoring to ascertain the meaning of provisions which appear to be sometimes in conflict with each other, and frequently difficult of interpretation.

The 16th Vic. ch. 192, (1853), authorized the companies to issue debentures for the payment of losses, and amended the 12th sect. to which I have called attention, by leaving the cash or down payment for expenses entirely within the discretion of the directors, instead of limited as formerly to five per cent. and making the balance of the note payable in part, or the whole, at any time when the board should deem the same requisite for the payment of losses or other expenses.

Then came the 18th Vic. ch. 120, which empowered the companies to separate their business into two branches or departments, one for insuring isolated buildings and property not hazardous, and the other for insuring buildings and property, hazardous and not hazardous, in towns and villages.

This statute contained a direction that the accounts of each branch should be kept separate and distinct the one from the other; and that members insuring in one branch, should not be held liable for any claims on the other branch, and assessments for expenses were to be divided and assessed on each branch in proportion to the amount insured in such branch.

The 16th sect. of the original Act was also amended by limiting the liability of a member to the amount of his premium note.

This Act was followed by the 22nd Vic. ch. 46, which for the first time introduced the feature of a guarantee capital, and provided that the companies should have power to raise by subscription of its members, or the admission of new members, not being persons assured, or by loan, a guarantee fund, which was to belong to the company, and be liable for all the losses, debts, and expenses of the company, and the subscribers were to have such rights as the directors should declare and fix by a by-law to be passed before the raising of the capital.

They were also empowered to create from the surplus profits of the company from year to year a reserve fund, for the purpose of paying off the guarantee capital, after which its affairs and property were to revert to and be vested in the parties insured as the sole members of the company.

The company were further empowered to collect premiums in cash for insurance for terms not exceeding one year, and such portion of the premium notes as the directors might consider equitable and necessary on all insurances for terms exceeding one year, to make a periodical division of profits equitably among the stock-holders and policy holders after providing for the reserve fund, and to extend their business to Lower Canada.

Power was taken to invest the funds of the company in mortgages, bank stocks, shares in building societies, and such other securities as the directors should think proper.

Thus stood the law at the time of the consolidation of statutes in 1859, so that although the companies might have two branches, the accounts of which were to be kept distinct, no provision was made for the distribution of the assets belonging to the guarantee stockholders between those branches in the event of the guarantee fund being paid off, nor to confine the distribution among the members of the company, it being merely provided that in such an event they shall become the property of the *parties insured*.

The Consol. Stat. was amended in 1864 by the 27 &

28 Vic. ch. 38, the only portion of which material to the present enquiry is sec. 6, which provides for the following addition to sec. 31. "As the object of such guarantee capital is to provide for the certain and speedy payment of losses, debts, and expenses, the directors may pledge as much as, but not more than two-thirds of the premium notes belonging to said company as a security to the subscribers of such guarantee capital."

The mere payment of the premium in cash, instead of the deposit of a premium note to be assessed for losses as they occurred, would not necessarily be inconsistent with the scheme of a mutual insurance company, so long as the cash took the place of the note as security for the ascertained losses, the balance being repayable to the member at the expiration of the term of his policy; but even this vestige of the mutual system is removed by the 31 Vic. ch. 32, sec. 5, O., which provides that the persons so paying in cash shall not be liable to any further charge or assessment whatever, nor shall they be held to be members of the company in any respect unless so constituted by the by-laws of the company.

As the law stood then, after the passing of the 22nd Vic. and before the amendment effected by the Act of 1868, 31 Vic. ch. 32, these companies ceased to be mere mutual insurance companies, but without any stock capital subscribed or paid were authorized to do a general business of insurance.

The main reliance of all insurance companies for the payment of losses, after becoming once fairly established, is upon the sums received for premiums, but in the early history of such companies there must be a time when the accumulations from this source would be insufficient, and the Legislature have therefore usually provided and made it a condition in the case of stock companies, that no such company shall go into operation until a named sum is subscribed for, and a certain per centage of that sum paid up, and in the case of mutual companies until a certain number of members have deposited their promissory notes.

It is true they had the power, if any persons could be found foolish enough to embark in the adventure, to admit new members other than insured members for the purpose of raising by subscription a guarantee capital for the payment of losses, debts, and expenses, but the repayment of this stock was limited to a reserve fund to be created from the surplus profits of the company.

It is not surprising that this new departure proved to be "a delusion and a snare." Few persons would be found willing to embark their capital in a guarantee fund, where their chance of repayment was confined to the surplus profits under such a state of things; and we accordingly find in 1868 power was given to levy an annual assessment on the premium notes in order to form a reserve fund, which the directors could at their option apply either to pay off the guarantee stock or such other liabilities as could not be ordinarily provided for out of the ordinary receipts for the same or any succeeding year.

It should be mentioned in this connection that the Dominion Parliament, in the general Act relating to insurance companies, passed in the session of 1868, which requires all companies, with certain exceptions, to take out a license, and to make a cash deposit, provided that mutual fire insurance companies receiving cash or part cash premiums in lieu of premium notes, or accepting risks other than from its own members, should deposit in the hands of the Receiver-General one-third of the cash premiums received, not exceeding the average annual amount of the cash premiums received by the company during the three years next preceding the date of its last return, or the average annual amount of losses sustained during the same period; thereby in effect reducing the available means for the payment of losses.

As the law stood then, in 1868, there were two classes of persons insured, one class paying a definite premium as a consideration for the risk which the company undertook to indemnify against, and having no interest in any other risk which the company might think fit to assume, the party

thus insured being simply an insured and not an insurer, those on the other hand insured in the mutual branch were not only insured but insurers, and to the extent of the premium, whether paid in cash or by deposit note (and until the passing of the 18 Vic. to the extent of one per cent. beyond the premium), personally liable as insurers of all other parties similarly insured, such other policy holders being to the same extent the insurers on his policy.

But the policy holders in the mutual branch were liable, if the contention of the appellants be well founded to have their insurance rendered ineffectual by the amount of their deposit notes being absorbed by assessments to make the reserve fund, which again might be wholly absorbed to make good the losses of persons not members but who had effected insurances on the cash system.

All the laws relating to mutual fire insurance companies were consolidated by the 36 Vic. ch. 44, O., which as to all companies thereafter to be incorporated prohibits the issue of policies otherwise than on the mutual system, and abolishes the guarantee capital, but declares that companies in existence at the time of the passing of the Act may still effect insurances on the cash principle, and that all the assets of the company, including the premium notes, shall be liable for all losses which may arise under insurances for cash premiums, and may also create a guarantee capital according to the provisions of the Acts previously in force.

The power to divide the business into branches is extended indefinitely, but the same directions are given as to the accounts being kept separate and distinct, and the same provision that members in one branch shall not be liable for claims on another branch.

The company whose affairs are now before us was a company in existence at the time of the passing of the Act, and was therefore in a position to avail itself of the power to raise a guarantee capital, either in the way of a loan or by the creation of a capital stock, and they resorted to the latter of these expedients for the purpose of raising such a fund in the present case.

Had this power stood alone, that is to say, if the Act authorizing the creation of a guarantee fund had contained no provision authorizing the formation of a reserve fund, by what authority could the company have assessed the policy holders on the premium notes for the purpose of paying off the guarantee fund? I understood the counsel for the appellants to contend that this power was conferred under the general words, that the subscribers were to have such rights as the directors should declare and fix by a by-law; but this could never mean to confer upon the directors by implication the power to assess the policy holders otherwise than in the manner and for the purposes specified in the Act. Having regard to the rule that the intention to authorize the imposition of a charge must be shewn by clear and unambiguous language, I find myself quite unable to say that the words here used—and which, in my opinion, are merely intended to define the rights of the shareholders, and confer upon them such privileges as it was within the power of the directors to confer—so clearly point to the intention to grant such an authority as to satisfy the rule.

I have already pointed out that the same language is used in the Act of 1859, which authorized the creation of a reserve fund, but gave no express powers to assess for it, and I apprehend that at that time it would not have been seriously contended that the directors had power to assess for such a purpose.

The extent of the powers of the directors thus to assess was confined to the calls rendered necessary for the payment of losses or expenses and for the payment of debentures issued for the payment of losses.

In the Act of 1868 an additional power was conferred to assess an annual sum, not exceeding ten per cent., on the premium notes, in order to create a reserve fund, and this fund the directors had power to apply, *inter alia*, to pay off the guarantee stock; but even then there was no power to assess directly to pay off the guarantee stock, but to create a reserve fund, which the directors might in

their discretion apply towards paying off the stock ; it was through the medium of the reserve fund that the payment was to be made.

But by the Act of 1873 the guarantee fund is abolished except as to companies then in existence, and the Acts previously in force are repealed, including the section relating to the reserve fund ; and it is provided, that as respects all transactions, regulations, modes of assessment, and other matters herein provided for subsequent to the Act taking effect, the provisions contained therein shall prevail.

The Act, it is true, by section 49 re-enacts a clause as to the creation of a reserve fund, and authorizes an assessment for the purpose, but makes no such provision as was to be found in the repealed Acts for applying the money to the re-payment of the guarantee fund, unless that can be held to be included under the words, "such liabilities of the company as may not be provided for out of the receipts for the same or any succeeding year." But I think the liabilities here referred to are liabilities to the public, or at least to insured members, and not to stockholders of the company, these persons occupy the position of partners in the concern, with such rights as the statute gives them or as are conferred upon them legally by the by-laws.

When we find the Legislature declaring that as to companies thereafter to be incorporated no guarantee fund shall be raised, and when in the same enactment they grant the privilege to existing companies of creating such a fund in either of the modes previously existing, and at the same time in the re-enactment of the provisions respecting the reserve fund omitting the words to be found in former Acts, it is reasonable to assume that it was intentionally done. I think if it had been their intention to extend it to the re-payment of the guarantee fund they would have carried it into effect by express and positive language. If from want of foresight, or for any other reason they have omitted to provide for such a matter, it is the province of the Legislature, and not of the Courts to supply the omission.

If this be the true view of this enactment we find this company after it came into effect passing a by-law in which they profess to authorize an assessment for the purpose of paying off the guarantee capital, which, in my judgment, they had no power to make; but even if that be not the correct view, there appear to be grave objections to its being now enforced in the manner proposed. If the company had the power to give such a security, then it was to that source, and that alone, the guarantee shareholders were compelled to look, and they should have seen that the directors performed their duty, and made and enforced the assessments from year to year against the policy-holders, who became such shortly after the passing of the by-law, but whose terms of insurance have expired without being called upon to contribute to the fund.

I am not at all prepared to say that the judgment of the Vice Chancellor may not be sustained upon the ground on which he has based his decision, but I am unable to convince myself that if the right to assess under the by-law still exists, the construction he places on the statute is the correct one.

As pointed out by Mr. Edward Martin, there is a broad distinction between an assessment made to pay a debenture issued to pay losses, and an assessment of this kind. In the one case the assessment is in effect to meet the loss, the payment of which has been deferred; but in the case of an assessment under the by-law it would not be to meet losses but in anticipation of losses, and it might happen that no losses might be sustained in a particular branch.

It may be said that this division into classes, and the direction that the accounts should be kept separate and the notes of one class made applicable to losses upon policies in that class must over-ride the whole enactment; and I should be of that opinion, and inclined to hold that moneys received on one class of such notes could not be diverted to the payment of losses in another class, and that the moneys received upon any particular assessment were impressed as it were with a trust and should be carried

to a particular account as part of the guarantee fund and applied only to the payment in advance of the assessment for loss, for losses in that branch as though the policies issued in that branch constituted the only business of the company, but for s. 71, now s. 75 of the Act in the Revised Statutes.

The section is entirely inconsistent with the clauses of the Act relative to branches, and the exemption of the members of one branch from liability for claims on another, or to be more precise, whilst recognizing that exemption, enacts that these very notes or undertakings shall be liable for all losses which may arise under insurance for cash premiums; and bearing in mind the well known rule that if two enacting clauses are repugnant the last must prevail, I can only conclude that the Legislature had deliberately sanctioned what would otherwise be a breach of trust, and authorized the directors to divert the proceeds from time to time received on notes given for a special purpose to the payment of general losses.

I should not have been pressed by the previous legislation which authorized the deposit of a certain proportion of premium notes in security, because, having regard to the whole Act, it must be assumed that the directors would have followed the instructions to keep separate accounts, and would have deposited notes in each branch proportioned as nearly as possible to the risks; but when we find the proceeds of these notes, by legislative enactment, diverted to the payment of losses not included in the branches, I find it difficult to say that the directors were not warranted in paying losses upon policies on the cash system from the guarantee fund, and recouping it by assessment on the notes.

As I am of opinion that under the Act of 1873, the power to assess for this purpose is not given, I have not thought it necessary fully to consider the other question.

But there is another point which was but faintly referred to on the argument, which is, I think, fatal to the appellants' case. If the power of assessment exists at all, it

was either one to be exercised in *the discretion of the directors*, or was obligatory upon them under the terms of the by-law. In either view it seems to me it is not in the power of the Court of Chancery to do what the directors might or should have done.

This is not an application for a winding-up by the Attorney General, but a creditors' bill. The Act of 1873 did, in the former case, profess to give power to the receiver to make such assessments for the payment of the debts and claims against the company as the directors would have had authority to make, but it being doubtful whether that power was not in excess of the jurisdiction of the local Legislature, it was repealed by the 40 Vic. c. 7, schedule A 147, and the power to make such assessments as may be required to meet losses is, I apprehend, still vested in the directors, but after this company has ceased to carry on business, they would scarcely be justified in assessing for a reserve fund.

In this view of the matter it is unnecessary to consider the questions raised on the cross-appeal.

The appeal should, in my opinion, be dismissed, with costs.

PATTERSON, J. A.—I agree that the appeal must be dismissed. It may not be easy to reconcile the various provisions of our laws respecting mutual insurance companies, or to discover in every case the exact principle by which this or that enactment is guided; but if any one thing in them is distinctly proclaimed, and is founded on a principle we can all understand and approve, it is the exemption of persons who insure in one branch from liability for the losses and expenses in another branch. When I say this principle is distinctly proclaimed, I by no means assert that careful regard has been paid to it in drafting the additions and amendments made from time to time on the subject of guarantee stocks, reserve funds, &c. It should, however, be possible so to construe the whole legislation as to preserve to policy holders in any branch the freedom

from liability for others declared in the statutes, and put prominently forward in the report presented to and adopted by the meeting of this company, which approved of the by-law under which the guarantee stock was created. I concur in the treatment of this question and in the result arrived at by Vice-Chancellor Proudfoot in the Court below, and by my brother Burton in the judgment he has just delivered, which I have had an opportunity of seeing. I do not attempt a separate examination of the statutes, because I am satisfied that the case against the appellants fails for want of jurisdiction. I take the same view of this matter as my brother Burton, and as expressed by Vice-Chancellor Blake in the judgment lately pronounced by him in *Hill v. Merchants and Manufacturers' Ins. Co.*, 28 Gr. 560.

The point is one which would have been fatal to the bill if raised by demurrer, but these appellants could not raise it at any earlier stage.

MORRISON, J.A., and BLAKE, V. C., concurred.

Appeal dismissed.

NOTE.—Pending this decision, the Legislature has again allowed Mutual Insurance Companies to combine a general business on the stock or proprietary principle with the mutual business, which by sec. 55 of the R. S. O., ch. 161, they had prohibited.—*Rep.*

PETERKIN V. MCFARLANE ET AL.

Decree—Vacation of, as against one of several defendants—Effect of.

A decree, which had been made against several defendants, one of them A., being administrator *ad litem* of a defendant who had died before answer, was vacated as to the defendant B., and leave given him to file a supplemental answer and have a new hearing of the cause. Subsequently C., who had, since the decree and before the appeal, been appointed administrator in place of A. who died after decree, applied for leave to file an answer setting up defences which his predecessor had omitted. It was shewn that he had been appointed *pro forma* to represent the estate: that no proceedings in appeal had been served upon him, and that no further relief was sought against the estate. The Referee granted the leave asked.

Held, affirming the order of Proudfoot, V. C., that the vacation of the decree as against B. did not, under the circumstances, open up the decree as against the deceased defendant's estate, and that the Referee had, therefore, no power to allow C. to file a supplemental answer.

APPEAL from the decree of Proudfoot, V. C.

The plaintiff, Mrs. Peterkin, filed her bill asking to have it declared that a deed made by her to the defendant McFarlane was by way of security only for \$500 lent her by McFarlane, and asking to redeem the land from the defendant Burke, who bought it from the defendants Rose & McKenzie, to whom McFarlane had sold it. She asked for an account of waste committed by any of the parties, and amongst other things asked that in case the grantees, or any of them, should have bought without notice of the equity, so that she could not redeem, that McFarlane might be ordered to account for the value of the land.

McFarlane died before answering, and a solicitor named Alma was appointed administrator by the proper Surrogate Court limited to the purpose of representing McFarlane's estate in this suit, and he answered, substantially admitting the allegation that the deed was by way of mortgage only. The other defendants also admitted that, and relied on their purchases for value without notice.

After the hearing, a decree was made in the plaintiff's favour, finding that the grantees took with notice, and ordering the usual inquiries with a view to redemption, and as to Alma, the administrator, an account only of waste committed by McFarlane.

Burke, one of the defendants, appealed from that decree, and this Court allowed the appeal; giving leave to Burke to file a supplemental answer setting up the defence of the Registry laws, or such other defence as advised, and ordering that the plaintiff should be at liberty to proceed to a second hearing in the Court below. The case is reported 4 App. R. 25.

In consequence of this order, an application was made by an administrator of McFarlane, not Alma, for he died in September, 1877, but a Mr. Pegley, who said in his affidavit that he was appointed by order of the Court of Chancery on or about the 7th February, 1878, administrator *ad litem* in this cause: that he was appointed at the instance of the defendants, in order, as he believed, that the appeal might be properly constituted, and was informed that his appointment was purely a formal matter; and that he consented, but took no steps in the matter until he was recently consulted by the next of kin of McFarlane.

His application was for leave to file an answer, and to deny the mortgage character of the transaction, which Alma had admitted.

One contention advanced in his petition was, that Alma's appointment was void for want of jurisdiction, referring apparently to its being *ad litem*.

The Referee made the order asked for, and on appeal it was rescinded by Vice-Chancellor Proudfoot, on the ground that by the order of this Court it was only intended to set aside the decree so far as the appellant Burke was concerned; and he therefore held that the order of the Referee was beyond his power to make (a).

The present appeal was from that order.

The case was argued on the 14th January, 1881 (b).

C. Robinson, Q. C., and T. Langton, for the appellant. The certificate of this Court, reversing the decree of the

(a) The case is not reported in the Court below, as judgment was given on the conclusion of the argument.

(b) *Present*.—BURTON, PATTERSON, and MORRISON, JJ. A., and OSLER, J.

Chancellor, gives the plaintiff a second hearing without qualification or restriction, and the defendants must all have the right of defending themselves in such new hearing as they may deem best. The plaintiff cannot have a new hearing without the defendants having a new defence, and there is nothing in the judgment or certificate indicating that the second hearing is to be against the defendant Burke only. The respondent relies upon the clause of the certificate which gives liberty to Burke alone to file a supplemental answer, and directs that for that purpose the replication be withdrawn; but the appellant submits that such clause in no way restricts the meaning of the clause directing a second hearing. Burke was the only defendant at the time applying for leave to file a supplemental answer, and therefore the leave given was properly confined to him. The intention of the Court, however, is clearly indicated in the judgments of Mr. Justice Burton and Mr. Justice Patterson, reported 4 App. R. 25. Mr. Justice Patterson, in unmistakable language, says, (p. 47): "I therefore think we should *vacate the decree* and send the case to another hearing." It is also abundantly evident that the opinion of the majority of the Court of Appeal was, that the evidence had failed to establish that the deed in question in this cause, though absolute in form, was intended to stand as security for repayment of money advanced by James McFarlane (see pp. 20, 29, 30, 31, 32, and 38-41), and the appellant submits that the intention of this Court was, that for the determination of that question, as well as of all others, a second hearing of this cause should be had. If the language of the certificate be not considered open to the construction which we submit should be put upon it, we ask that the certificate should now be amended so as to correctly express the intention of the Court. The respondent contends that this Court could not have intended to direct a second hearing of this cause generally, because it was not in the power of the Court to make any order except as between the plaintiff and the then appellant, the defendant Burke; but

the appellant submits that such contention is not correct. See R. S. O. c. 38, sec 25. The case of *Tasker v. Small*, 1 C. P., Cooper, 255, cited by the respondent in support of such contention, is not applicable in view of the enactment above mentioned, and has not been followed in subsequent cases. They cited *Saffron Walden, &c. v. Rayner*, L. R. 14 Chy. D. 406; *Vaughan v. Halliday*, L. R. 9 Chy. 561; *Kent v. Freehold, Land, &c., Co.*, L. R. 3 Chy. 493; *Gilbert v. Jarvis*, 16 Gr. 275-279.

Walter Cussels and *H. Cassels*, for the respondents. Unless it can be successfully contended that by the order of this Court, made on the appeal of the defendant Burke, from the decree herein, the cause is again put at issue as between the plaintiff and all the defendants, the Referee, before whom the appellant presented his petition for the relief denied him by the order appealed against, had no jurisdiction to grant the relief prayed, as the application was in effect a motion for a new hearing, on grounds disclosed in the affidavits and papers filed, and should have been made to the Court. If the learned Referee had jurisdiction to entertain the application, the appellant comes before him as standing in the place and stead of the defendant John P. Alma, deceased, and seeking to be relieved, without sufficient reason, from the effect of the admissions and acts of the said Alma, properly made by him, as the legal personal representative of the estate of McFarlane, in the course of the suit; but the supposed merits alleged by the appellant, are not supported by evidence, and no *prima facie* case for relief is made out. The order made by this Court on the appeal does not, however, direct a new hearing between any of the parties hereto, except the plaintiff and the defendant Burke, as is plain upon the face of the order, and upon a perusal of the judgments delivered by this Court, when read in connection with the facts then before the Court. Burke's appeal was based upon the refusal of the learned Chancellor to allow him to file a supplemental answer, setting up as a defence to the plaintiff's claim the registry law in force in this Province

and that is the relief awarded to him by this Court, and is the only issue now to be tried in this suit, as appears by the supplemental answer of Burke, filed pursuant to the leave granted by this Court. Even if that issue were found in favour of the defendant Burke, it would not disentitle the plaintiff to the relief granted to her by the decree herein as against the other defendants. This Court should not, on this application, amend the order, even if the order was held not to fully carry out the judgment, inasmuch as on this appeal this Court can make only such order as the learned Referee had power to make, and should have made on the application before him. The plaintiff and the defendant Burke were the only parties before this Court on the appeal from the decree, and to allow his co-defendants to take advantage of his appeal would be a violation of the provisions of the R. S. O. c. 38, s. 26, no notice of appeal having been given by any of the co-defendants. The Court will not extend the benefit of an appeal by one defendant to his co-defendants who have not appealed, even where the rights of the co-defendants as against the plaintiff are identical, and the Court will not do so *a fortiori* where the defendants' rights as against the plaintiff are entirely diverse, and the complete reversal of the decree as against the appealing defendant does not change the plaintiff's position as against the co-defendants. The application before the learned Referee and this appeal are really in the interests of the daughters of McFarlane, who, by their delay and acquiescence, are now precluded from asking the relief prayed. The authorities do not warrant an application for a new trial or a new hearing, upon such evidence as is proposed to be adduced in this case by the applicant, and to encourage such applications, after such long delay, is to imperil the rights of parties, and to subject them to loss of evidence and other disadvantages. They cited *Tasker v. Small*, 1 C. P., Cooper, 255; *Ainslie v. Ray*, 21 C. P. 152

March 26, 1881. BURTON. J.A.—This is an appeal from

an order of Proudfoot, V. C., setting aside an order made by the Referee, which allowed the defendant Pegley, the administrator *ad litem*, to represent the estate of James McFarlane, deceased, and to file a supplemental answer.

The learned Vice-Chancellor sat as a member of the Court of Appeal, on the hearing of the original appeal of this case from the decree of the Chancellor, and was aware, therefore, that that appeal was by the defendant Burke alone, as no other party at that time was seeking relief, and he accordingly held, on perusal of the order of this Court, that it was merely intended to open up the decree so far as the appellant was concerned, and that the Referee was not warranted under that order in allowing the filing of the answer.

I take it to be clear that as a general rule where an amendment is asked for or allowed as to one defendant, the effect of which is to alter the position of the plaintiff as against other defendants, all the parties affected by that amendment should have an opportunity of being heard, and no such amendment would be permitted the effect of which would alter the rights of other parties to the suit without such opportunity being afforded to them.

A perusal of the present appeal book discloses a singular state of things.

James McFarlane, to whom the conveyance was made which it was sought in this suit to have declared to be a mortgage, and whose estate might be made liable for the value of the land, in the event of the plaintiff failing to shew that the purchasers from McFarlane took with notice died after being served with the bill, and before he had put in an answer, and thereupon the Surrogate Court of the county of Kent appears to have granted to one Alma letters of administration, not apparently *pendente lite* or for a limited time, but for the purpose of representing the deceased in this suit.

It appears that Alma also died after the decree was pronounced but before it was entered, and then the defendant Pegley was appointed by the referee to represent the estate,

not apparently at the instance of the parties beneficially interested in that estate. This was in February, 1878, and although the appointment was alleged to have been made in order that the appeal might be properly constituted, and that appeal was not heard till the following September, he was no party to it, and Alma, though dead months previously, still appeared in the appeal books as the representative of McFarlane, and I should gather that no notice of the appeal was given to Pegley, as he states in his affidavit: "I was appointed at the instance of the defendants in order, as I believe, that the appeal might be properly constituted, and was informed that my appointment was a purely formal matter," and in his petition states that from the time of his appointment he had heard nothing of the proceedings, or been served with any papers, or acted in any way.

It is of no great importance that the estate was not represented on that appeal, as no relief was asked for at the hearing against other parties to the suit, and no suggestion made that as to them the plaintiff would be prejudiced by the amendment.

No question arose or was suggested as to opening up the decree beyond what was necessary to enable the appellant to file a supplemental answer, and the general language referred to in some of the judgments must be construed with reference to the actual fact that one party only was appealing and that no complaint was made of the portion of the decree which affected the other defendants. The Court were dealing only with the one defendant who had appealed, and as to him, vacated the decree to enable him to set up the registry laws as a defence.

I think the view taken of the order of this Court by the learned Vice-Chancellor is the correct one, and that the decision now appealed from should be affirmed and this appeal dismissed, with costs.

To prevent any further misapprehension, it would be proper to preface the order dismissing this appeal with a declaration that no further relief other than that given by

the present decree was sought by the plaintiff against the other defendants, as was stated by her counsel on the argument, and acquiesced in by the plaintiff's solicitor in his affidavit filed in answer to the motion.

PATTERSON, J. A.—I think Mr. Cassels has made it very clear that we should not disturb the decision of the learned Vice-Chancellor.

The point seems a simple one, and scarcely calling for many remarks; but as there may be some substantial rights involved in the matter of practice, and also as for my own part I am more familiar with the principles acted on in the Common Law Courts than in the Court of Chancery, or perhaps I should say with the details of the practice of those Courts, because I apprehend the principles should be the same in both, I may be permitted to state my understanding of the matter. [The learned Judge here stated the facts as above.]

I say nothing of the merits of Mr. Pegley's application, which are not before us. I assume, however, that he made a case for admission to answer, if proceedings against the estate he represents were still in *feri*, as the order was made by the referee, and was reversed on other grounds.

It is perfectly correct to say that this Court intended to relieve Burke only, and in fact Burke was the only defendant before us. Mr. Pegley was not before us, and as far as I know he was not a party respondent.

In a Common Law case, I speak without venturing to affirm what the rule now may be, inasmuch as all the defendants were necessarily sued in respect of some charge against them jointly, if a verdict went in favour of one defendant and against another, the practice was to require the losing defendant, if he moved for a new trial, to call upon his co-defendant or give him notice of the rule; because, having once escaped, he ought not to be sent to trial again without an opportunity to shew cause against such a course, and a new trial necessarily opened the case against all the defendants.

I believe of late years a new trial is sometimes restricted to one of several parties where their interests can be separated.

In Chancery, when the relief sought against one defendant is not the same as that sought against another, or if the same, their liability may not be joint, I see nothing to prevent a decree for or against one standing, while as against another it is vacated, and a new trial ordered.

The vacation of the decree against Burke would not therefore of necessity open the case against his co-defendant. It is true, that in the event of Burke ultimately succeeding, the plaintiff might wish for a different decree against the estate of McFarlane; but that is her own affair. She may be so confident of success against Burke as to be content with the decree she has against the estate; and I cannot say that Mr. Cassels is not entirely correct when he submits that the order of this Court left the decree against the estate unopened. Had it been otherwise, there seems ground in the little we know of the matter for looking favourably on the application to plead, if really made on behalf of the estate, for it seems hitherto to have been very inefficiently represented, if represented at all.

But as the application is met by the objection that no further relief is sought against the estate in consequence of the order of this Court, and as that objection is entirely consistent with the terms of the order, I am of opinion that the referee had no power to open up the decree of the Court, and that therefore we must dismiss this appeal, with costs.

MORRISON, J.A., and OSLER, J., concurred.

Appeal dismissed.

MEMORANDUM.

On the 2nd day of May, 1881, the Honourable JOHN GODFREY SPRAGGE, heretofore Chancellor of Ontario, was appointed Chief Justice of the Court of Appeal, in the place of the Honourable THOMAS MOSS, deceased.

HATHAWAY V. DOIG.

Nuisance—Interlocutory injunction—Title to property in wife—Adding parties.

The defendant was engaged in making boilers and gas receivers, in the manufacture of which it was necessary to join together pieces of iron about an inch thick by riveting, which produced noises, continuing from seven in the morning until six o'clock at night, rendering the occupation of the house of the plaintiff's wife, which was only fifteen feet distant, and in which they lived, almost impossible and seriously interfered with her health. Upon a bill filed by the plaintiff, **PROUDFOOT, V. C.**, granted an interlocutory injunction restraining the defendant from continuing the boiler-making in such a manner as to be a nuisance to the plaintiff and his premises.

Held, reversing this decree, that the wife was the proper person to file the bill, for as injury to property is the ground of jurisdiction in cases of nuisance, the owner of the property is the proper party to complain.

Quære, whether the husband had any title in the land, and whether his occupancy with his wife was more than permissive on her part.

An application made by counsel to add the wife as a party, in order to meet the difficulty, authority having been given by her, was refused on the ground that the suit was not merely, not properly constituted, but that the husband having no *locus standi*, the suit had no proper existence at all, and another person who had the right could not be substituted for one who had not the right to institute the proceedings.

Held, also, that if the suit had been properly constituted, the Court would not have interfered with the discretion of **PROUDFOOT, V. C.**, in granting the interlocutory injunction.

THIS was an appeal from a decree of **Proudfoot, V. C.**, restraining the defendant from continuing the work of boiler-making in such a manner as to be a nuisance or injury to the plaintiff and his premises.

The bill alleged that the plaintiff was the owner, and had for a number of years resided in a house on Nelson street, in the city of Toronto: that the defendant had a steam engine and machine factory within 15 feet of of the plaintiff's house, and that immediately adjoining the factory the defendant had a building in which he had recently commenced to carry on the work of making boilers and gas receivers: that the factory was driven by a steam engine which had no smoke consumer attached to it, and the smoke consequently caused much inconvenience and annoyance to the plaintiff: that in making the boilers and gas receivers the defendant caused great noises to be made, which rendered the occupation of the plaintiff's house

almost impossible, such noises being made by joining pieces of iron about one-eighth of an inch thick by rivets, which had to be hammered: that the noises commenced about seven o'clock in the morning, and continued with slight intermission until six o'clock in the evening; that thereby the value of the plaintiff's property was greatly depreciated; and that unless the noises were abated the plaintiff would be obliged to give up his residence in the said house, as the health of his wife had been materially injured by the noises.

The bill prayed that the smoke and noises might be declared to be nuisances, and asked an injunction until the hearing restraining the same.

Affidavits were filed in support of the statements made in the bill, and the defendant met these by affidavits stating that the said works were not carried on in such a manner as to be a nuisance.

The plaintiff, on cross-examination on his affidavit, admitted that the property of which he described himself as owner in the bill belonged to his wife.

The case was argued on the 1st and 2nd June, 1881 (a).

McCarthy, Q. C., and *J. H. Ferguson*, for the appellant. The appellant was not proved to have been guilty of causing the nuisance alleged in the plaintiff's bill, and the weight of evidence is against the existence of any such nuisance. Until the hearing of the cause it cannot be assumed that the defendant is guilty of the nuisance, as the mere fact of his making or causing a noise to be made in the carrying on of his trade is not itself a nuisance. The degree of noise constitutes the nuisance, and the question is therefore one originally for a jury, not for the Court: *St. Helen's Smelting Co. v. Tipping*, 11 H. L. C. 642; *Attorney-General v. United Kingdom Electric Telegraph Co.*, 30 Beav. 287. The question of the liability of the defen-

dant being at present undetermined, an interlocutory injunction ought not to have been granted, unless under circumstances of great urgency or pressing necessity, which have not been shewn: *Elwes v. Payne*, L. R. 12 Ch. D. 468; *Kerr on Injunctions*, 1st ed., 337, 2nd ed., 16. It was not proved that the plaintiff is in danger of irreparable injury from the continuance of the alleged nuisance, or of suffering such damage as justified the exercise of the discretion in ordering an interlocutory injunction: *McLaren v. Caldwell*, 5 App. R. 363. On the balance of inconvenience, the evidence establishes that the great preponderance is against granting an injunction before the hearing. If the acts of the defendant complained of constitute a nuisance at all, the nuisance is a public one, and the plaintiff does not shew that he thereby sustains such special damage or peculiar injury as would entitle him to relief in respect of the same in this suit: *Soltau v. DeHeld*, 2 Sim. N. S. 142; *Attorney-General v. Cleaver*, 18 Ves. 211; *Ware v. Regent's Canal Co.*, 3 DeG. & J. 228; *Winterbottom v. Lord Derby*, L. R. 2 Ex. 316; *Plewes v. Hall*, 29 U. C. R. 472; *Fisher v. Municipality of Vaughan*, 12 U. C. R. 55; *Iveson v. Moore*, 1 Lord Raym. 481; *Ricket v. Metropolitan R. W. Co.*, L. R. 2 H. L. 175; *Benjamin v. Storr*, L. R. 9 C. P. 400; *Fritz v. Hobson*, L. R. 14 Chy. D. 542; *Baird v. Wilson*, 22 C. P. 491; *Beckett v. Midland R. W. Co.*, L. R. 3 C. P. 82; *Jones v. Chappell*, L. R. 20 Eq. 539; *Small v. Grand Trunk R. W. Co.*, 15 U. C. R. 283. The plaintiff by his acquiescence and laches has disentitled himself to any relief, and at all events, obtaining an injunction before the hearing: *Gordon v. Cheltenham R. W. Co.*, 5 Beav. 233; *Attorney-General v. Sheffield Gas Co.*, 3 DeG. M. & G. 304, 310, 311, 323-327; *Joyce on Injunctions*, 102; *Hale v. Barlow*, 4 C. B. N. S. 334; *Swaine v. The Great Northern R. W. Co.*, 9 Jur. N. S. 1196. It is admitted by the plaintiff that the property in question belongs to his wife, who was the proper party to file this bill. Moreover the suit has not even been brought by the plaintiff for his own benefit, but he has been put forward by others to try a right in which he has not any

substantial interest: *Attorney-General v. Sheffield Gas Co.*, 3 DeG. M. & G. 311; *Forrest v. Manchester, R. W. Co.*, 4 DeG. F. & J. 130; *Pentney v. The Lynn Paving Commissioners*, 13 W. R. 983; *Wood on Nuisances*, 502, 584, 655-56.

E. Blake, Q. C., and *W. Barwick*, for the respondent. No weight should be given to the objection that the respondent has no *locus standi* owing to the title to the property in respect of which the bill is filed being in his wife, inasmuch as his lawful occupancy of the property was alone sufficient to enable him to maintain this suit. Moreover, he had sustained such loss by his wife's illness as to entitle him to complain. If, however, the Court is of opinion that the wife is a necessary party, she has given her consent to be joined. The authorities cited by the appellant were cases where the plaintiff was suing in a representative capacity and are consequently not applicable. Even if the nuisance in question be a public one, as is contended, it is clear that the respondent may have an injunction in regard to a particular damage sustained by him. That the noises mentioned in the bill are a nuisance, is established beyond a doubt by the evidence. The case was one of great urgency, as the respondent's comfort and enjoyment was being materially interfered with; and the dangerous condition of his wife was mainly attributable to the noises complained of. The appellant, although admitting that it was possible to abate or diminish the nuisance without interfering with the operations of his manufactory, made no offer to attempt an abatement. Under such circumstances an injunction was properly prayed, and the learned Vice-Chancellor exercised a wise discretion, with which this Court will not interfere. The charges of acquiescence and laches are not sustained by the facts. They cited *Joyce on Principles of Injunctions*, 101; *Bankart v. Houghton*, 27 Beav. 425; *Attorney-General v. Sheffield Gas Co.*, 3 DeG. M. & G. 304; *Forrest v. Manchester R. W. Co.*, 4 DeG. F. & J. 126; *Simper v. Foley*, 2 J. & H. 555; *Tipping v. St. Helen's Smelting Co.*, L. R. 1 Chy. App. 66, 13 W. R. 1,083; *Winterbottom v. Lord Derby*, L. R. 2 Ex. 316; *Plewes v. Hall*,

29 U. C. R. 472; *Gullick v. Tremlett*, 20 W. R. 358; *Ball v. Ray*, L. R. 8 Chy. App. 467; *Sturges v. Bridgman*, L. R., 11 Chy. D. 852; *Cartwright v. Gray*, 12 Gr. 399.

June 17, 1881. SPRAGGE, C. J. O., delivered the judgment of the Court.

The injunction granted by the Vice-Chancellor prohibits the defendant from doing only one of the several things complained of by the plaintiff in his bill. It restrains him from continuing his works in such a manner as to cause by the noise referred to in the tenth paragraph of the bill, a nuisance or injury to the plaintiff and his premises. The noise is thus described in the tenth paragraph of the bill: "Noises made by joining pieces of iron of about one-eighth of an inch thick by rivets, which have to be hammered, and in the hammering of the said rivets these noises are produced."

The other matters complained of are not prohibited at present; so that upon this appeal we have only to deal with the one question, whether the noise made by the defendant in riveting boiler plates is of such a character as to constitute a nuisance, and a nuisance to such a degree as to make the interposition of the Court of Chancery proper, and proper in the way in which it has been exercised by the granting of an interlocutory injunction, that is, if the plaintiff's position is such as to give him a *locus standi* in this Court.

To take first the question of nuisance or no nuisance. The riveting of boiler plates is part of a lawful trade; but its being so does not excuse its being carried on, if carried on as it is it interferes to a material extent with the comfort and ordinary enjoyment of life in the neighbourhood. Does this boiler riveting do this? We have the evidence of a considerable number of persons that it does; and they describe how it does so; that it interferes with reading, with conversation, with sleep, with study, and in the case of the plaintiff's wife with health.

A considerable number of persons are called for the

defendant, a larger number than have been called for the plaintiff, but they do not displace the plaintiff's case—the facts remain as sworn to by the plaintiff's witnesses. The defendant's witnesses, some with more, some with less positiveness, say that they do not experience annoyances from this riveting of boiler plates; that *to them* it is not a nuisance; but they do not displace the fact that to a considerable number of persons it is a nuisance; and that its effects upon them are what they describe. There is no conflict of evidence in the strict meaning of the term; for what each says may be perfectly true; and we have no reason to believe it to be otherwise. If what the plaintiff's witnesses say be true, as we do not doubt that it is, the fact is established of a business being carried on by the defendant, which, in the mode in which it was carried on when this bill was filed, was in law a nuisance.

The plaintiff lived so near to the defendant's place of business as to give him a right to complain, if his residence there was one of right; and of such a tenure as to give him a right to complain. The defendant, by his counsel, denies that he has a tenure which gives him a right to complain; and the defendant has a right to make this objection, though the question which it raises has nothing to do with what are really the merits of the case.

The plaintiff's wife is tenant in fee of the place, and the plaintiff himself has no title to be there—to live in his wife's house—unless he has such title in virtue of his marital right.

It was said by Lord Justice Turner, in the *Attorney-General v. The Sheffield Consumers Gas Co.*, 3 DeG. M. & G. 304, 319, that he took the general principle on which the Court interferes in cases of the kind to be the inadequacy of the remedy which the law gives in such cases; and that the jurisdiction of the Court must rest on the ground of injury to property. The Court interferes by injunction in aid of the legal right, and although now the Court of Chancery determines the legal right as well as the question, whether a proper case for injunction is made out, the principle

remains that it is only where there is a right of property, legal or equitable, that the Court interferes by injunction in a case of nuisance.

The wife was the proper person to file this bill. It is at least doubtful whether the husband has any *title* in this land; whether his occupancy with his wife is more than permissive on her part. But without determining that point, it is clear that the right of property is in her; and as injury to property is the ground of the jurisdiction in cases of nuisance, the owner of the property is the proper party to complain. Our opinion, therefore, is, that the suit as it stands, is not properly constituted.

In order to meet the difficulty, it is proposed that the wife should be added as a co-plaintiff; counsel for the plaintiff having her authority to make her a party plaintiff. What is proposed is not unattended with difficulty. If the husband has no *locus standi* in Court, as we think, the suit is not merely not properly constituted, but it has no proper existence at all. If initiated by one having a right to bring suit, but without joining others who ought to be joined, the suit would be merely defective, and it would not be objectionable under proper circumstances to add by amendment such parties as ought to have been made parties originally. But it is difficult to see how this can be done where the plaintiff has no right to be plaintiff at all; and this we conceive to be the position of the husband in this case. If a sole plaintiff is not a proper party, he is not in a position to be heard in the suit at all. The adding of parties as co-plaintiffs is upon the application of the plaintiff already upon the record to amend his bill; but if he has himself no right to the position of plaintiff, he is met with two objections, one that he cannot be heard at all; the other, that if he could be heard at all, he could not be heard to ask that another should be joined with him as plaintiff, when he himself has no right to be plaintiff. If he could apply at all, his application should be that another person, who has the right which he has erroneously stated was in himself, should be sub-

stituted for himself as plaintiff. Such an application manifestly could not be entertained. It seems to be impossible to avoid the conclusion that this plaintiff has no *locus standi* entitling him to this injunction.

It is not really necessary to consider the question which was also raised upon the argument of this appeal, that even if it would have been proper to have granted an injunction at the hearing, it was not proper to grant an interlocutory injunction. I will state the inclination of our opinion, as it may possibly tend to prevent future litigation. If the suit had been properly constituted, we should not have been disposed to interfere with the discretion exercised by the learned Vice-Chancellor. I have already described the nature of the nuisance, and how serious are its effects upon a considerable number of persons in the neighbourhood. We have a great deal of evidence; and evidence which is entitled to all the more weight that we have depositions and cross-examinations, as well as affidavit evidence. This evidence does not, to our mind, make it reasonably doubtful whether the defendant's exercise of his trade is not a very serious nuisance, interfering with the ordinary comfort and enjoyment of life of the neighbourhood. He must have known that the carrying on of this trade, (I speak of the rivetting of boiler plates) would produce such effects as it has produced; he did a wrong to his neighbours by carrying on such a trade. An opportunity was given to him of trying the question of right by a hearing of the cause at an early day, now some time past, which he declined. The learned Vice-Chancellor thought that, under all these circumstances, it was not reasonable that the plaintiff and his family should be compelled to continue to endure all this until the Autumn Sittings of the Court of Chancery, which, as we know, are usually held in November; that it was a lesser evil that the defendant's boiler riveting should be stopped. We think that this Court would have done right, (if this suit had been properly constituted) not to interfere with the discretion, exercised as it was by the Vice-Chancellor.

As to costs.—The plaintiff, on cross-examination upon his affidavit, said: "My wife owns the house: I do not." It then became known to his counsel, if not known before, that the statement in the bill that the plaintiff was the owner was erroneous. This, of course, was known to the plaintiff before he filed his bill. It is not the case of a fact coming to the knowledge of parties at a late stage in a cause.

The bill was wrongly filed at first, through, we may assume, the mis-statement of title by the plaintiff to his solicitor. The true state of the title came out at an early stage of the cause. The proper course then was, to dismiss the bill and commence *de novo* with a suit properly constituted. The point seems to have been raised before the learned Vice-Chancellor, that being, as far as appears, the first occasion on which it could have been raised. If the title had been truly stated in the bill, the plaintiff would have stated himself out of Court, and the defendant might, in the view we take of the matter, have demurred; and if he had omitted to do so, he could have recovered only such costs as he would have been entitled to if he had demurred.

The fault in this matter has been from the first the fault of the plaintiff, and we see no sound reason for taking the case out of the usual rule that the costs abide the event.

Appeal allowed.

THE CORPORATION OF THE TOWNSHIP OF STAFFORD
V. BELL.

Provincial Land Surveyor—Improper survey—Liability for damages.

A surveyor in making a survey is under no statutory obligation to perform the duty, but undertakes it as a matter of contract, and is liable only for damages caused by want of reasonable skill, or by gross negligence.

The defendant, a provincial land surveyor, who was employed by the plaintiffs to run certain lines for road allowances, proceeded upon a wrong principle in making the survey, and the plaintiffs sued him for damages which they had paid to persons encroached upon by opening the road according to his survey,

Held, reversing the judgment of the Common Pleas, 31 C. P. 77, that the plaintiffs could not recover, as although the survey was made by the defendant on an erroneous principle, the evidence failed to prove that the lines as run by him were not correct.

Quare, per PATTERSON, J.A., whether the fact that the plaintiffs knew that the correctness of the survey was questioned before opening the road, did not make them guilty of contributory negligence.

Remarks upon the impropriety of receiving the opinions of surveyors as experts, as to the proper mode of making a survey under a statute

APPEAL from the Court of Common Pleas.

This was an action against a provincial land surveyor for negligence and want of skill in making a survey for the plaintiffs of the lines for the road allowance between lots Nos. 9 and 10, in the 1st, 2nd, 3rd, and 4th concession of the township of Stafford, whereby great loss and damage were occasioned to the plaintiffs, who had to employ surveyors to make the said survey and run the lines over again, and to pay damages to property owners who were injured by having the lines run by the defendant upon their properties, and for removing bridges and making new excavations, and for other costs and expenses.

The facts are fully set out in the report of the case in the Court below : 31 C. P. 77.

Cameron, J., before whom the case was tried, without a jury, entered a verdict for the plaintiffs, and assessed the damages at \$200.75.

Afterwards a rule *nisi* to enter a verdict or nonsuit for the defendant was discharged. From this decision the defendant appealed.

The appeal was argued on the 3rd June, 1881 (a).

Christopher Robinson, Q.C., for the appellant.

D. B. Read, Q. C., and *W. Read*, for the respondents.

The arguments of counsel sufficiently appear from the judgments.

July 8, 1881. BURTON, J. A.—It was very strenuously contended upon the argument that this case was not governed by the law applicable to attorneys and other professional men, inasmuch as the surveyor is sworn "to survey agreeably to the directions of the statute," which it is said were plain and unambiguous, and because he is performing a statutory duty.

I confess myself at a loss to understand how the oath, even if it were in the terms suggested, could add to the obligation; but in truth the oath which a surveyor takes is for the faithful performance of his duties, in the same manner as an attorney is sworn faithfully to perform his, and it is a confusion of terms, as it seems to me, to speak of the work undertaken by this defendant as being so undertaken in the exercise of a statutory duty.

The law respecting land surveyors does, it is true, define the method of procedure to be observed in making survey in many supposable cases, and affords greater facilities for proving negligence than in actions against others undertaking a professional duty; but a surveyor is under no statutory obligation to perform the duty, but undertakes as a matter of contract, like any other professional man, to do the service required of him; and as in all other cases of a cognate kind, there must be evidence of a want of reasonable skill and knowledge or of gross negligence before he can be made liable in this form of proceeding.

If some plain violation of a clear direction of the statute, such as no one with a proper knowledge of his profession

(a) *Present*—HAGARTY, C. J. Q. B., BURTON, PATTERSON, and MORRISON, JJ. A.

would be guilty of, were established, he would be liable unquestionably in the same way as an attorney would be liable, who should advise his client that a younger son of an intestate was the sole heir-at-law, and that he could safely purchase from him; or that a will of real estate was valid with only one subscribing witness; but you can only expect of a surveyor that he shall be honest and diligent, and that he brings to the practice of his profession a reasonable amount of skill and knowledge.

It is not pretended that in the actual work done, that is, in the mode in which it was actually carried out upon the ground, it was not skilfully and properly done; and it is shown that the defendant was a man of skill and experience; but what is complained of is, that he proceeded upon a wrong principle, and that this was so clearly contrary to law as to amount to evidence of such gross negligence, ignorance, and unskilfulness, as to render him liable.

It is manifest that the defendant was in error in supposing that any distinction existed in the mode of running a side line pure and simple and a side line which was also a road allowance between adjoining lots; but this in itself is not sufficient to render him liable; it must in addition be shown that the survey is erroneous, and that the plaintiffs in consequence have suffered damage. He has drawn a line direct between the posts planted in the front of two concessions, but it is not shown that the line so drawn does not correspond with the bearings of the proof or governing line.

The township in which the survey in question was made was laid out in sections, in accordance with a recommendation made by the Surveyor General, and followed by an Order in Council in 1829.

Each section formed a parallelogram consisting of 12 lots of 200 acres each—six lots fronting on each concession road, with a blind line between them, bounded at each end by proof lines. Instead, therefore, of a base or proof line extending the whole length of the township, it exten-

ded across two concessions only, and formed the proof line for the 12 lots in that section, the proof line next the other end forming in like manner the proof line for the next section. Each of these proof lines was to be laid out as a direct line from one concession road to the other; and it is clear upon reading the order in council, under which this mode of survey was adopted, that whatever may have been the intention in the original survey, it was intended that in the event of boundaries being lost, the parallelograms should be divided from angle to angle into six equal parts, and then the lines run from the *front* of one concession to *that* of the *other*, according to their respective numbers, by a *direct line*. A diagram is referred to in the order in council, which has unfortunately been lost, or it would have shown precisely what was meant by this; but I apprehend it was intended in the contingency referred to to run the line directly through from one road to the other. Why this course should be pursued unless it corresponded with the scheme of the survey, as originally intended, it is difficult to understand, and it commends itself as reasonable rather than having jogs at the rear of each lot, which must necessarily arise by commencing the survey from the front of each concession.

It would seem, however, to receive no warrant from the Act of parliament, by which alone surveyors are to be guided.

It is clear, nevertheless, that the base or proof line of the section was intended to be a direct line—there is no pretence for supposing that the surveyor would run other than a through line on a certain course from one concession road to the other concession road; and that this line should, as is now provided by sec. 57 of the R. S. O., ch. 146, be the governing line for all the division lines in the section.

In the instructions which Ritchey, the surveyor who made the original survey of the township, received, he was furnished, with a plan showing his proof lines marked red.

In opening these proof lines, as also the concession lines,

he was directed to be particularly careful that the intersections formed in the progress of the survey should be truly correct, and all the proof lines and concession lines *truly direct* and also parallel to their respective bases.

The lots were to be posted on their fronts on their concession roads.

Not a word is said in the instructions about posts being planted at the blind lines marking the rear of the two concessions, and the placing of a post there would obviously be most unnecessary and misleading.

But the survey of the defendant is not shown to be incorrect, unless it is proved that in running it as it is it is not drawn parallel to the governing line between 6 and 7. I am not at all satisfied that it is not, and I think the persons who have chosen to assume that the post spoken of by the witnesses as being found between those lots on the blind line is an original post, are fully as likely to be mistaken as the defendant.

The witnesses who speak of it are unable to describe any marks upon it which would raise a presumption that it was a post of that character. One witness says he judged it was an original post from its age, and because it was undisturbed, but he judged only that it was about midway between the two concessions, and he took no evidence to prove it an original post. Burgess, who seems to have known this post longer than any of the other witnesses, is unable to remember what was marked upon it, and Wright speaks of it as marked simply with the letter R., and is unable to speak of any other marks. It seems to me it would be very dangerous if this sort of evidence could be received to establish an original post, not corresponding with, but contrary to, what was laid down in the Surveyor-General's suggestions, upon which the order in council was founded, and contrary to what we find in the instructions to the surveyor who actually made the survey.

What I understand by an original post is, a post planted by authority in pursuance of instructions in an original survey. I am not prepared to say that every post planted

by such a surveyor would come within the definition if it were not planted with a view to carrying out the instructions. I am not saying that the work on the ground is not to govern; that is a wholly different matter; if the surveyor assumes to carry out his instructions, but makes mistakes, the work on the ground, however erroneous, must govern, but I fail to see any evidence proper to submit to a jury that this post was planted in the original survey.

There is no evidence whatever to show by whom it was planted, and the presumption that might arise if such a post had been directed to be planted to mark the blind line, and a post had been found in that vicinity, is wanting.

The instructions disclose the fact that the posts to mark the lots were to be on the front, 50 links from the centre of the road, and 50 links from the centre of the proof line in the case of the lots adjoining the proof line, and there is nothing to indicate the intention of placing a post at any other place on this proof line. And one of the advantages pointed out by the Surveyor-General in adopting this mode of surveying into sections was, that the posting or fixing of boundaries would be reduced about one half.

It is difficult to understand how, in a survey of the proof line, made as this line is directed to be made, a jog as spoken of by some of the witnesses could occur. Commencing a survey from the front of each concession the lines would almost necessarily fail to connect, making what is familiarly spoken of as a jog; but run as this line was, that was out of the question, although if the post was really placed where it was found by the surveyors, it would demonstrate that it was not run in a direct course, but would be more correctly described, as the witness Cromwell described it, as a curved line. Now with great deference I should say that there was no evidence at all here which a Judge would be warranted in submitting to a jury of there being an original post, and if this is not established there is nothing, in my opinion, to show that the line run by the defendant was not run on the same bearing as this

proof line, and unless this is satisfactorily shown the plaintiffs' case necessarily fails; but apart altogether from the insufficiency of the evidence to establish this as an original post, I consider, for the reasons suggested by my brother Patterson, that, whether it is so or not, becomes immaterial, looking at the directions contained in sec. 64 of the Surveyors' Act.

It becomes unnecessary therefore to offer any opinion as to whether the apparent inconsistency between the suggestions and directions of the department and the rule prescribed by the statute would afford any answer to an action of this description, where the surveyor has chosen to disregard that rule.

On the ground that it is not shewn that, although the survey was made on a wrong principle, the line surveyed may not be truly parallel to the governing line as required by the statute, I think the action fails, and this appeal should be allowed, with costs.

PATTERSON, J.A.—The consideration of this case has left on my mind the impression that the successful party, whichever party that may be, will not be indebted for success to any striking merits. I do not feel that either party has deserved to succeed, or that either party, if loser, will be entitled to much sympathy.

The defendant, who very frankly states in his evidence the principle on which he made his survey, was undoubtedly wrong in adopting that principle. His idea that a side line, along which there is an allowance for road, should, in any case, be run for that reason on a different principle from a side line where no allowance existed, was, I imagine, original. It derives no support whatever from the statute to which surveyors have to look for the rules they are to follow in running lines. I fully concur with the learned Judges in the Court below who held that disobedience to the plain rules laid down in the statute is a breach of duty which may entail liability for whatever damage may naturally result from it, notwithstanding that

the surveyor may have honestly arrived, by reasoning on the circumstances of the particular case, at the conclusion that he could make a better rule for himself, or one better adapted to those circumstances. It does not strike me that it is a question of opinion. The statute leaves no room for opinions, but lays down rules which are to be obeyed. Particular cases may occur which the statute does not provide for; and as to them other considerations may arise. But even then I should not be prepared to say too hastily that a surveyor would run no risk, although he ran such a line as in his judgment was best, if he did not inform his employer that it had no statutory sanction.

But while the defendant was wrong in the course he pursued, the members of the council, if we give credit to some evidence adduced for the plaintiffs, apparently with the object of showing that the defendant was worse than negligent or ignorant, and had knowingly run a line which, to use the expression given in evidence, "would not stand law," must have known before taking measures to open the road that the correctness of the survey was questionable. The present reeve, and one or two others whose lands were intruded upon, speak of express admissions by the defendant, very soon after his survey, that it would not "stand law;" and as they shew that they protested against the opening of the road, the conclusion would be natural that the members of the council knew exactly what the defendant had done, and knew that he had himself doubts of its legal validity, while he considered it was the best way to lay out the road. If they knew what mode of survey he had adopted they would have been on a par with him (as we must impute to them a knowledge of the law) in their means of judging of its legality, provided they knew also the scheme of the original survey and other facts which the defendant knew, or should have known. It is true, the defendant denies having said what Mr. Townshend and others say he said; but I am speaking at present of the evidence given on behalf of the plaintiffs. Taking that evidence, and even

taking with it the evidence of the defendant, it seems to me by no means clear that, if the defence had been addressed to the question of contributory negligence, the plaintiffs would have been acquitted of that charge.

There is one feature of the evidence to which I wish to allude, because I have often had similar evidence offered at Nisi Prius; and I think its reception is calculated to encourage mistaken ideas upon the very question debated in this case, viz., the immunity of a surveyor who sets up an opinion of his own or of some one else as an excuse for setting aside the statutory rules. I refer to questions addressed to surveyors as experts, and to opinions given by them as to what a surveyor ought to do in given circumstances. Such opinions cannot assist and may mislead. When given on a trial by jury they are most objectionable. It is the duty of the Judge to declare the law as to a survey made under the statute, just as it is his duty to rule upon the law on any other subject. When such evidence is given to the jury, the impropriety of its reception is apparent from the consideration that the Judge may have to lay down the law as very different from that stated by the witness.

In this case, unless I mistake the effect of the statute, all the surveyors who were called, and who all agreed in their exposition of what the defendant ought to have done, overlooked the provisions of the statute which applied to the case, and as a consequence were all wrong in their opinions.

I shall refer to these provisions presently. Before doing so I wish to explain that while I agree with the learned Chief Justice in the views of the law expressed by him in his judgment in the Court below, with the exception of one particular depending upon a section which, as far as I notice, was not given much prominence in the argument before him, there is one matter of fact which may not be of much moment, but which does not strike me in the same way as I find it apprehended by him. Alluding to the post on the "blind line," his lordship remarked that

there was reason to believe that the blind line was posted throughout the township at those points where it intersected a proof line.

If the case turned in my view upon this post as a governing point, I should require more evidence than there is before us before I could form an opinion strong enough to be called a belief, that a chain of posts had been planted along the blind lines. No one speaks of any other such post. The field notes of the original survey give no hint of such work, which, however, amounts to no more than absence of evidence, because even the posts on the concession roads are not noted in the field notes. The instructions did not require such posts to be planted, as I read them. The direction is to "post the lots at a distance of fifty links each way from the centre of the road, as also on the proof lines": that is, to post the lots on the proof lines at the distance of fifty links from the centre of the road on the proof lines—evidently the posting on the concession road to mark the intersections, which were to be made "truly correct." The other view requires the words to be read as if they were "as also on the *blind line*." I find nothing in the instructions or the field notes, or in any part of the evidence except the incident of the discovery of this one post, to suggest any recognition during the original survey of the line between the two concessions, though I should, if at liberty to surmise, suppose it not unlikely that in running out as directed "one full township of 12 concessions of 66 chains 67 links each, with one chain for a road between every alternate concession," a post may have been planted, at least on the township line, and possibly also on the proof lines, to indicate the depth of each concession. Those posts would not be the posts mentioned in the instructions; and would in all probability be just what this post seems to have been—a solitary post at each intersection with the blind line, not two posts each 50 links from the centre of the road.

The sections of the statute (R. S. O. ch. 146), to which I think it necessary to refer are the 46th, 57th, and 64th, as

establishing the boundary or course which the surveyor, running a line under the terms of the 62nd section, ought to be governed by. By section 46 all boundary lines of townships, &c., all concession lines, governing points, and all boundary lines of concessions, *sections*, blocks, gores, and commons, and all side lines and limits of lots surveyed, and all posts or monuments marked, placed, or planted at the front angles of any lots or parcels of land, under the authority of, &c., shall be the true and unalterable boundaries of all and every, &c.

This is the section which makes the work on the ground unalterable so long as it can be traced. Applying it to the *section* which contained lots 9 and 10, between which the defendant was to run the line, it settles, *first*, that the road actually run from the front of the third to the front of the fourth concessions was the unalterable boundary line of the section, notwithstanding that it was crooked, as all the witnesses say, and had two bends in it, one of 60 and the other of 90 feet, as Mr. Townshend states that the defendant said. I use the word "front" in the sense in which it was used in the instructions, and in which it is used in the present law, understanding the front of the fourth concession to be at its western side. *Secondly*, it settles the posts planted at the front or eastern end of lot six in the third, and at the front or western end of lot six in the fourth concession, as unalterable boundaries of the section.

Section 57 declares that in such a *section* as this, the division or side lines shall be governed by the *boundary lines of such section*, in like manner as the division or side lines in townships originally surveyed before 27th March, 1829, are governed by the boundary lines of the concession in which the lots are situate.

And section 64 directed that every land surveyor employed to run any division line or side line between lots, or any line required to run parallel to any division line or side line in the concession in which the land to be surveyed lies, shall, if it has not been done before, or if it has been

done but the course cannot at such time be ascertained, determine by astronomical observation the *true course of a straight line between the front and rear ends of the governing boundary line of the concession or section*, and shall run such division line or side line as aforesaid, truly parallel to such straight line, if so intended in the original survey, or at such angle therewith as is stated in the plan and field notes as aforesaid, which shall be deemed to be the true course of the said governing or boundary line for all the purposes of this Act; although such governing or boundary line as marked in the field be curved or deviate otherwise from a straight course, &c.

What are the front and rear ends of the section? Plainly two opposite extremities; and as plainly, the posts I have just alluded to at the east of lot 6, in the third, and the west of lot 6 in the fourth concession. Therefore, while the crooked line, if run on the ground in the original survey, as it is said to have been, governs the owners whose side line it forms, the *governing boundary line*, which is to be followed in running other side lines, is a *straight line* through two concessions.

This 64th section it is which seems not to have been brought to the attention of the Court below.

But while the governing boundary is a straight line from post to post through the two concessions, it does not follow that in making a survey such as that made by the defendant through the two concessions, he was right in running straight from post to post.

The 62nd section gives the rule under which he should have run the line in each concession from the front of that concession. Running the lines in this way, each parallel to the governing boundary, the probability, judging from experience, is, that the lines would not exactly meet. Whether that would be so in this case we do not know, because no one has made the survey in that way. The defendant was certainly wrong in the principle of his survey. The other surveyors were also wrong in assuming that the course from the posts on the roads to the post on

the blind line was to govern ; and having all made their survey on that erroneous method, they do not shew that the defendant's line may not happen to be, as it certainly would be on paper, precisely the line that would be found by a proper survey.

If we should indulge in the conjecture that the line actually run cannot possibly be the true line, but that there must inevitably have been a jog at the centre, we should not aid the plaintiffs, unless we could carry our conjecture to the length of surmising that the jog would have left unaffected the lands on which the corporation entered to open the road, and in respect of which the damages were paid, which the plaintiffs now seek to visit upon the defendant ; and for such a conjecture as this there would be no foundation whatever, not even the unsubstantial one of a deduction from what has happened or may be supposed to have happened in other cases.

The result is, that while the defendant cannot offer any tenable justification of his mode of survey, the plaintiffs are not shewn to have been injured by it, and therefore have not proved their right to maintain this action.

I agree that we must allow the appeal, with costs, and that the rule in the Court below should be made absolute to enter a nonsuit.

HAGARTY, C. J. Q. B., and MORRISON, J. A., concurred.

Appeal allowed.

TRUST AND LOAN COMPANY V. LAWRASON ET AL.

Mortgage—Distress clause—Tenancy at will.

The distress clause in the Short Forms of Mortgages Act is merely a license to take the goods of the mortgagor; the intention being to provide in a concise referential manner for the disposal of the goods when seized in the same manner as goods seized for rent.

A mortgage made in pursuance of this Act, contained the following: "and the mortgagor doth release to the company all his claims upon the said lands, and doth attorn to and become tenant at will to the mortgagees, subject to the said proviso." It also provided that the mortgagees, on default of payment for two months, might on one month's notice, enter on and lease or sell the lands; that they might distrain for arrears of interest, and that until default of payment, the mortgagors should have quiet possession.

Held, OSLER, J., dissenting, reversing the judgment of the Queen's Bench, 45 U. C. R. 176, that though the relation of landlord and tenant may have been thereby created, yet there was no rent fixed for which there was power to distrain, and the plaintiff therefore could not claim a landlord's right as against an execution creditor, of a year's arrears of interest on their mortgage before removal by the sheriff.

The relation of landlord and tenant may be created by proper words between mortgagee and mortgagor for the *bona fide* purpose of further securing the debt without being either a fraud upon creditors, or an evasion of the Chattel Mortgage Act.

APPEAL from the Court of Queen's Bench.

This was a special case stated without pleadings.

One Christie, by mortgage dated 23rd March, 1877, and made in pursuance of the Act respecting short forms of mortgages, (now R. S. O. ch. 104), conveyed to the plaintiffs certain lands, with a proviso for redemption on payment of \$34,000 on the 1st April, 1882, with interest thereon at eight per cent. half yearly. The mortgage contained, among others, these clauses: "That in default or non-observance of any of the provisions or stipulations therein contained, the company shall have quiet possession of the said lands, free from all incumbrances; and that the mortgagor will insure the buildings on the said lands to the amount of not less than \$10,000; provided that the company may insure the same without reference to the mortgagor, and charge any moneys paid by them in respect thereof upon the said lands. And the mortgagor doth release to the company all his claims upon the said lands, and doth attorn to and become tenant at will to the company, subject to the said proviso. * * Provided the company may distrain for arrears of interest. * * Pro-

vided that until default of payment, the mortgagors' shall have quiet possession of the said lands." The mortgagor had been in possession from and at the time of the execution of the mortgage till at and after the seizure by the sheriff hereinafter mentioned. In December, 1879, the sheriff, under execution against the mortgagor at the suit of the defendants, seized the goods of the mortgagor on the lands mortgaged. Before sale and removal of the goods, but after the seizure, the mortgagees, claiming as landlords of Christie, notified the sheriff that they required, before removal of the goods, payment of \$2,720 as for one year's rent, for a year next preceding the notice. On this an interpleader was had; the goods were directed to be sold, and a case was stated for the opinion of the Court, whether or no the mortgagees were entitled to the proceeds of the sale of the goods or of any of them.

The Court of Queen's Bench held that a tenancy-at-will was created by the mortgage at a fixed rent, equivalent to the interest, for which the mortgagees had all the remedies of a landlord, including the right to a years rent, against the defendants. The case is reported 45 U. C. R. 176.

The case was argued on the 12th January, 1881 (a).

J. K. Kerr, Q. C., and Wilkes, for appellants. This case is governed by *The Royal Canadian Bank v. Kelly*, where the Court of Error and Appeal reversed the decision of the Court of Common Pleas, that the Statutory distress clause in a mortgage under the Short Forms Act creates the relationship of landlord and tenant between the mortgagor and the mortgagee. The distress clause in the mortgage in question is a mere license to the mortgagees to distrain the goods of the mortgagor for arrears of interest. Such a license does not entitle them to succeed in the present case, where the goods of the mortgagor have been seized by his execution creditors, for such a license cannot affect the rights of persons not parties to the instrument. The respondents make their claim under

(a) *Present*.—BURTON, PATTERSON and MORRISON, JJ. A., and OSLER, J.

the provisions of the Statute of Anne, 8 Anne ch. 14, sec. 1, and in order to succeed they must show that there was an actual and *bond fide* tenancy. We contend that no tenancy whatever is created by the mortgage in question. The attornment clause is repugnant to the other provisions of the mortgage, and should be treated as nugatory; and in any event, even if a valid attornment clause had been inserted in the mortgage, we say that it would not create such a tenancy as is contemplated by the Statute of Anne, which should be a real tenancy, and not a mere sham for the purpose of further securing a mortgagee. The mortgage contract provides for the loan of money and the payment of interest thereon, but no provision is made for the payment of rent; and even if the attornment clause or any other clause in the mortgage should be held to create a tenancy, it would yet be a tenancy without any provision for payment of rent, while the Statute of Anne contemplates a lease at a fixed rent. No term can be created by the mortgage in question by reason of its non-execution by the mortgagees. The case of *Clowes v Hughes*, L. R. 5 Ex. 163, shows that there was no subsisting tenancy here. The mortgagor retained possession as the owner of the property, subject to the charge created by the mortgage, and by the terms of the mortgage he was entitled so to hold until default. After default, a notice from the mortgagees to the mortgagor was necessary in order to change the relationship between them. It is against public policy that any such power should be given to mortgagees, as is here claimed by the respondents. Such a power is in direct contravention of the policy of the Chattel Mortgage Act, and if allowed would seriously impair the usefulness of that Act.

Robinson, Q. C., and Mursh, for the respondents. We contend that the Statutory distress clause contained in the mortgage in question, coupled with the possession had by the mortgagees pursuant to the provisions of the mortgage, created the relationship of landlord and tenant between the mortgagor and the respondents: *Royal Canadian*

Bank v. Kelly, 19 C. P. 196 and 430, as explained in 14 C. L. J. 8. The whole case turns upon the answer to be given to the question: Is there a tenancy at a fixed rent? Mr. Justice Gwynne, in *Royal Canadian Bank v. Kelly*, 19 C. P. 211, held that the words "by distress warrant to recover by way of rent reserved," mean, *in the character of rent reserved*, and Chief Justice Hagarty, in the Court below, put the same construction upon these words. Various authorities are relied on by the appellants in which a judicial construction has been given to clauses in other mortgages whereby the mortgagees were authorized to recover their interest "by way of distress warrant," "as in case of distress for rent," &c. These clauses are clearly distinguishable from the one in question. They point to the *mode of recovery*, while this one points to the *nature of the thing recovered*. It is to be recovered "by way of rent." Rent and interest are by it made equivalent and interchangeable terms. The effect of this is, to reduce the arrears of interest to the extent of whatever amount of interest may be collected by way of rent. This avoids the difficulty raised in some of the cases decided under other distress clauses where it was objected that there was no provision for the application of the rent in payment of the interest. Upon reference to Webster's Dictionary under the word "way" it will be found that the phrase "by way of" is equivalent to the phrase "as being" "in the character of."

Upon substituting either of these latter phrases for its equivalent as used in the Statutory distress clause, it will appear that the distress clause indicates not only the mode in which the overdue interest may be recovered, but also *the character in which it is to be recovered*, viz: as a rent. The attornment clause in this mortgage creates a tenancy; the distress clause makes interest recoverable *qua* rent, and the proviso for redemption fixes the rate of interest. Therefore by application of the maxim *id certum est quod certum reddi potest*, the rent becomes fixed. There is no presumption against the creation of a tenancy by reason

of an express power being given to distrain : *Jolly v. Arbuthnot*, 4 DeG & J. 224. An instrument like the one in question is not to be construed according to the strict rules which govern ordinary leases, but the whole instrument must be read, and its whole scope and object considered in order to ascertain the intention of the parties : *Morton v. Woods*, L. R., 4 Q. B. 305, 306. The non-execution of the mortgage by the mortgagees does not prevent it from creating the relationship of landlord and tenant, for the term was well created by the attornment clause in the mortgage, coupled with the possession retained by the mortgagor with the acquiescence of the mortgagees "*pursuant to the provisions of the mortgage.*" The only provision of the mortgage pursuant to which the mortgagor could retain possession after default is the attornment clause. Moreover, a valid term was created by virtue of the Statute of Uses : *Morton v. Woods*, L. R., 3 Q. B. 663 ; *Leith's R. P. Stats.* 392, 393. In any event, quite apart from the effect of the attornment clause and the Statute of Uses, the tenancy created by the distress clause is not wholly avoided because of the non-execution by the mortgagees, for by the express provisions of the Statute of Frauds there will be a tenancy at will. See *Morton v. Woods*, L. R. 4 Q. B. 307. The case of *Clowes v. Hughes*, relied on by the appellants, is not in point, for there the tenancy was by the terms of the instrument to commence at a future indefinite time, while here the term was validly created on the very instant that the mortgage was executed. The respondents' claim is not prejudiced by the Chattel Mortgage Act, as is intimated in the judgment of his Lordship Mr. Justice Cameron, in the Court below, for the instrument in question is not a "mortgage or conveyance intended to operate as a mortgage of goods and chattels." In order that an instrument may be avoided by the Chattel Mortgage Act, it must be strictly within the terms of that Act. See *Patterson v. Kingsley*, 25 Gr. 425, and *McMaster v. Garland*, 31 C. P. 320. It has, moreover, been held, time and again, by the English Courts that such an

instrument is not affected by the Chattel Mortgage Act : *Morton v. Woods*, L. R. 4 Q. B. 307 ; *Re Stockton Iron-works Furnace Co.*, L. R. 10 Chy. D. 335 ; *Ex parte Jackson*, *Re Bowes*, L. R. 14 Chy. D. 725. Attornment clauses in mortgages are valid and operative, and may, and ordinarily do, create the relationship of landlord and tenant with all its usual incidents, including the right of distress : *Jolly v. Arbuthnot*, 4 DeG. & J. 224 ; *Morton v. Woods*, L. R. 3 Q. B., 658, affirmed on appeal, 4 Q. B., 293 ; *Re Stockton Iron-works Furnace Co.*, L. R. 10 Chy. D. 335 ; *Ex parte The Queen's Benefit Building Society*, *Re Threlfall*, L. R. 16 Chy. D. 274 ; *Ex parte Jackson Re Bowes* L. R. 14 Chy. D. 725 ; *Ex parte Punnett*, *Re Kitchen*, L. R. 16 Chy. D. 226, and see note to *Keech v. Hall*, Smith's L. C. (8th ed.) 583. All objections about public policy and honesty of purpose are disposed of in *Ex parte Jackson*, where it is explained that the mortgagee's ordinary right is to take possession and to rent the premises, and he may as well rent them to the mortgagor as to a stranger. He takes this benefit along with the burden of having to account for the rents and profits that he should receive. The Statute of Anne extends to the case of tenancy under an attornment clause in a mortgage : *Yates v. Rutledge*, 5 H. & N. 249 ; *Culyer v. Speer*, 4 Moore (C. P.) 473, S. C. 2 Brod. & B. 67 ; *Munro v. Commercial Building Society*, 36 U. C. R. 469.

July 8, 1881. BURTON, J. A.—I remember being much impressed at the time of the delivery of the judgment by Mr. Justice Gwynne, in the case of the *Royal Canadian Bank v. Kelly*, 19 C. P. 296 and 430, that that decision had gone much farther than any previous case, and was not warranted by the authorities.

I have listened, therefore, very attentively to the arguments on the present appeal, and have again very carefully considered the judgment of that learned Judge, but am unable to agree in his view, that the occupation of the mortgagor under the terms and conditions of the mortgage there referred to constituted the relation of landlord and

tenant between him and the mortgagees at a fixed rent, nor do I see that the plaintiffs' case is advanced by the circumstance that here there was an attornment clause under which the mortgagor expressly attorned and became tenant-at-will to them. He thereby, it is true, became tenant, but that clause makes no reference whatever to a stipulated or fixed sum as rent, without which no power to distrain would arise as an incident to the tenancy. The words "subject to the said proviso," which must, I assume, be held to apply to the proviso for redemption, and not to the immediately antecedent proviso, can receive no such interpretation as is contended for as fixing the sum therein mentioned as rent.

I am discussing the question at present without reference to the distress clause. There is nothing to be found then in this lease apart from that clause, to which I shall presently refer, which would have warranted a distress, as in the case of *Morton v. Woods*, reported in L. R. 3 Q. B. 671, and affirmed on appeal in L. R. 4 Q. B. 293. In that case the mortgagor not only attorned as tenant from the date of the execution of the mortgage, but became such tenant at and under the yearly rent of £800, payable yearly.

In the present case, as in the case of *Royal Canadian Bank v. Kelly*, 19 C. P. 296 and 430, there is not the slightest intimation in any portion of the mortgage that any particular sum was reserved as rent.

A very long series of cases confirmed and approved of in *Ex parte, Jackson, Re Bowes*, L. R. 14 Ch. Div. 723, have established beyond controversy that mortgagees have a right, as an additional security for the payment of the mortgage money or the interest, to insist on the mortgagor becoming their tenant at a rent to be agreed on, and that where the rent so reserved is fair and reasonable and the intention and object of the arrangement is not to commit a fraud upon the Insolvent laws, but in good faith to obtain that additional security, such an arrangement is perfectly valid, the mortgagees assuming all the inconvenient as well as all the beneficial consequences arising from it, one of which,

as pointed out by Lord Justice Bramwell, may be to give a second mortgagee or other subsequent incumbrancer a right to charge them with the rents so reserved and which they might, but for their own default, have received.

It strikes me as a fallacy to speak of giving effect to the language and apparent intent of the Legislature in construing this distress clause. As I understand the object of the Legislature in passing the Act respecting short forms of mortgages, following the Imperial legislation on the same and similar subjects, was to get rid of the unnecessary verbiage made use of by conveyancers; and if they could have always relied on the judgment and discretion of the taxing officer it is quite probable that they would have contented themselves with directing that in estimating the proper sum to be charged for the preparation of a mortgage, that officer should consider, not the length of the deed, but the skill and labour required and the responsibility incurred. Such a scheme would appear more reasonable than declaring that one set of words shall when used have a more extended meaning; but no different effect is to be given to the extended words than if found in an ordinary deed thus framed, and we are therefore to consider the language of this mortgage and the construction to be placed upon it as if the parties themselves had prepared and executed it in its extended form.

In that extended form we find that rent is nowhere referred to except in the distress clause, and we find that the mortgagor attorns and becomes tenant, and that this attornment is contained in the same section which purports to release to the mortgagee whatever rights, legal or equitable, he has in the mortgaged premises, subject always to the proviso—that is, to the mortgagor's right to redeem. What then is the effect to be given to this distress clause, which in its extended form is a covenant declaration and agreement between the parties, that if default should happen to be made in any part of the said interest at any of the days limited for the payment thereof, it should be lawful for the mortgagees to distrain therefor upon the lands,

and by distress warrant to recover by way of rent reserved, as in the case of demise of the said land, so much of the interest as shall remain in arrear together with the costs, charges, and expenses attending such distress, as in the like cases of distress for rent?

Let us in the first place consider the effect of such a clause where there is no attornment, but where the short form given in the Act has been strictly adhered to. Can it be successfully contended in such a case that anything more was intended than to give to the landlord a license to take the mortgagor's own goods towards satisfaction of the interest, but providing a certain mode of realizing by sale. It is clear that a tenancy between mortgagor and mortgagee is not created by the mere grant of a power to distrain for interest in arrear, even though the mortgagee be empowered to distrain *as for rent* reserved by lease, the word rent in such a case not requiring the existence of a tenancy but being used only to direct the mode of dealing with the distress. Such was the case in *Doe Williamson v. Goodier*, 10 Q. B. 959; the mortgage there authorized the mortgagee to enter and distrain upon the premises for interest if unpaid, *as for rent*. Lord Denman, in the course of his judgment in that case takes occasion to say the word *rent* does not require that a tenancy should exist at the time of distraining, but only directs the mode of dealing with the distress.

If then the words "as for rent," coupled with the actual possession of the mortgagor, would not be sufficient in such a mortgage to create a tenancy at a fixed rent, is the matter carried any further by the attornment and the words actually used in this clause? The attornment, as I have already observed, could not, as there is no rent fixed or referred to in it. Mr. Marsh argued with much ingenuity that the words, "by way of rent reserved" might be read "as being rent reserved," and refers to such an interpretation of these words in Webster's Dictionary; but the same authority gives a further interpretation, "in the character of." Adopting either construction, it would seem to me that

finding the words in this clause, and this clause only, looking at the whole instrument and finding there no reservation of rent, either expressly by reference or by implication, that there is the same form of expression as is used where there is no attornment clause and where it is manifestly intended as a license to seize only, and looking also at the serious consequences as to third parties, we should be slow to place upon these words a construction they do not necessarily bear, but hold them to confer a mere license, rather than by implication to place it in the power of these mortgagees, as Blackstone says, "to be their own avengers, and to minister redress to themselves," not only as against the goods which the mortgagor had power to deal with, but against those of strangers. It is also to be observed in this connection that the words of the clause are, "to recover by way of rent reserved," *as in case of demise of the said lands*, words quite inconsistent with this being a case of a demise at a rent reserved. Of course, unless it can be gathered from the whole instrument that the interest here was reserved and payable as rent, the parties cannot by agreement between themselves allowing a distress for the enforcement of the payment of the interest, annex the incidents of distress for rent so as to extend it to the goods of a stranger.

I entirely agree that if upon a proper interpretation of this mortgage—treating it as a mortgage in the extended form—it can be read as reserving the interest or a sum equivalent to the interest as rent reserved, it is not open to the objection of being invalid either as in fraud of creditors or an evasion of the Chattel Mortgage Act, and that the mortgagees as landlords would be entitled to seize the goods of a stranger upon the premises, or to avail themselves of the provisions of the Statute of Anne so as to prevent the removal or sale of the goods until their rent was satisfied; but it is because I feel that upon a proper construction of the deed the clause in question amounts at most to a license to seize, prescribing in a concise referential manner that the goods when seized may be disposed of

as in cases of distresses, that I am unable to treat this as a valid claim under the statute for rent under a demise, and that the plaintiffs therefore are not entitled to any portion of the money realized from the goods which after seizure under execution could not be taken under a license enforceable only between the immediate parties to it.

For these reasons I am of opinion that the judgment below is erroneous, and that the question submitted for the opinion of the Court should be answered in the negative, and judgment entered accordingly for the defendants, with costs, and the costs of this appeal.

PATTERSON, J. A.—The questions involved in this case are certainly interesting, but it would be easy to overestimate their general importance. There is no difference of opinion amongst the learned Judges who have dealt with them in the Court below; and, in truth, no room for difference of opinion exists upon the doctrines of law applicable to the case. It is well settled that the relation of landlord and tenant may be created between mortgagee and mortgagor by an attornment clause inserted in the mortgage deed, with all the rights and liabilities incident to that relation, including the right to distrain the goods of a stranger upon the demised premises. It is also made clear, particularly by the latest English decisions on the subject, such as *In re Stockton Iron Furnace Co.*, L. R. 10 Ch. D., 335, and *Ex parte Jackson*, L. R. 14 Ch. D. 725, that while the circumstance that the attornment is inserted as providing a speedy and convenient process for enforcing the payment of interest, or even of principal money, is consistent with the creation of the relation, yet the relation of landlord and tenant so created must be a real one. The last mentioned decision is especially instructive in the distinct enunciation of the principle that the demise to the mortgagor, to be valid as creating the power to distrain as landlord, must be of the same character as one which the mortgagee, having under the conveyance a right to the possession of the premises, might make

to a stranger, and the rent reserved such as an ordinary tenant would be willing to give for the property under ordinary circumstances. The question, as put by one of the learned Lords Justices, is, whether there is a real or only a fictitious and ostensible contract to constitute the relation of landlord and tenant. If it is real, then he says at p. 740, "the stipulation that a rent fairly reserved, a real rent, is to be applied in paying the principal and interest of the mortgage debt, cannot avoid a contract which in other respects is a real contract, and not a mere device to cover something else."

The question here is, whether upon the proper construction of the deed before us a real tenancy has been created, or only a license given to the mortgagee to distrain the goods of the mortgagor for arrears of interest. The question is essentially the same as that which would have arisen if the mortgagee had distrained the goods of a stranger, as in the case of *Royal Canadian Bank v. Kelly*, 19 C. P. 196; because, the goods having been taken in execution, the plaintiffs in this interpleader can only maintain their claim to be paid a year's rent, under 8 Anne, ch. 14, sec. 1, against the defendants, who are the execution creditors, by establishing that the lands were "leased for life or lives, term of years, at will, or otherwise."

The mortgage, which is expressed to be made in pursuance of the Act respecting Short Forms of Mortgages, contains the statutory short form proviso: "Provided that the company may distrain for arrears of interest;" and this is made equivalent to the extended covenant, "that if the said mortgagor, his heirs, executors, or administrators, shall make default in payment of any part of the said interest at any of the days and times hereinbefore limited for the payment thereof, it shall and may be lawful for the said mortgagee, his heirs or assigns, to distrain therefor upon the said lands, tenements, hereditaments, and premises, or any part thereof, and by distress warrant to recover by way of rent reserved, as in case of a demise of the said lands, tenements, hereditaments, and premises,

so much of such interest as shall, from time to time be or remain in arrear and unpaid, together with all costs, charges, and expenses attending such levy or distress, as in like cases of distress for rent."

This is the same clause which in the case of *Royal Canadian Bank v. Kelly*, which was argued in the Common Pleas before Mr. Justice Gwynne, sitting alone, was held by that learned Judge, when coupled with the occupation of the premises in pursuance of the clause, which in the short form is: "17. Provided, that until default of payment, the mortgagor shall have quiet possession of the said lands," to create the relation of landlord and tenant at a fixed rent. It is much to be regretted that the judgments delivered in the Court of Error and Appeal in that case are not available for reference, and that there is therefore some uncertainty respecting the precise grounds on which the view taken by Mr. Justice Gwynne was overruled. I was acquainted with the decision at the time, having been one of the counsel who argued the case in appeal, and during the dozen years that have since elapsed I have always thought of it as a decision that the distress clause amounted to a license only; but my recollection is not precise enough to enable me to say it proceeded on that ground alone. It may be that my present opinion is, to some extent, influenced by my apprehension of the effect of that decision; but, however that may be, I am unable to concur in the view that the clause, either by itself or coupled with the occupation under clause 17, creates a tenancy at a fixed rent. As a matter of policy, I do not think we should extend the effect of the clauses beyond the direct import of their language. If the parties had in view the creation of a tenancy which would authorize the taking of the goods of a stranger to pay the debt of the mortgagor, that result, iniquitous as it may be, could have been attained by the insertion of a provision amounting to an express demise at a fixed rent; and it would be the duty of a Court, if such a purpose were manifest, to give a fair and reasonable construction to the deed in furtherance of it, without regard to their approval or disapproval.

We have examples of construction on this principle, in *Morton v. Woods*, L. R. 3 Q. B. 658, 4 Q. B. 293, and in *Re Threlfall*, L. R. 16 Ch. D. 274, which cases were cited in the argument before us, although the latter had not then appeared in the regular reports. In *Morton v. Woods*, there was a clause by which the mortgagor attorned tenant to the mortgagee for ten years at a fixed rent, followed by another, which gave power to the mortgagee to enter into and upon the mortgaged premises, without any notice or demand of possession, to eject the mortgagor, and any tenant or person claiming under him, and to determine the term of ten years, notwithstanding any lease or leases that might have been granted by the mortgagor. This was held by several of the Judges to create a tenancy at will that was to last for ten years, provided the will was not sooner determined. The necessity for construing the tenancy as one at will arose from the fact that the mortgagee had not executed the deed. Referring to this case, James, L. J., said, at p. 281, in *Re Threlfall*, "that there was no actual demise, but, for the purpose of giving effect to the manifest intention of the parties, it was held that a tenancy at will had been created." In *Re Threlfall*, the attornment was stated to be as "tenants from year to year;" and there was a clause similar to that in *Morton v. Woods*, entitling the mortgagees to enter, at any time after the 1st September, 1871, and determine the tenancy created by the attornment. The mortgage was made on the 1st June, 1871. It was argued, on the authority of *Morton v. Woods*, that the tenancy was at will, and therefore the landlord could not distrain after the bankruptcy of the tenant. But it was held by the Chief Judge and by the Court of Appeal that the tenancy was from year to year. James, L. J., said: "We are asked in this case not to construe a deed, but to contradict it, for the purpose of entirely destroying the intention of the parties to it." Cotton, L. J., said: "It is argued that the point was concluded by the authority of *Morton v. Woods*, because some of the Judges there said that the tenancy in that case was not a demise for ten years, but that it

was intended to be a tenancy at will. One can hardly think they meant a tenancy at will with all its consequences. At all events, that opinion was founded on the construction of that particular deed, and cannot bind the construction of another deed in different words." And Lush, L. J., who had taken part in the judgment in *Morton v. Woods* said, at p. 282, "the argument in that case was, that the attornment was for ten years, and if so void because not made by deed; and therefore the Judges said that it was a tenancy at will, meaning a tenancy for an indefinite term not to exceed ten years, determinable at the will of the landlord. That is precisely like this case, a yearly tenancy with an express proviso for the determination of that tenancy at any time by will of the lessor." *Morton v. Woods* is also noticed with approval in *Ex parte Punnett*, L. R. 16 Ch. D. 226, which was cited to us from the *Weekly Reporter*.

In approaching the construction of the deed before us I do not perceive any good reason for assuming that a mortgagee has any other object in view, in exacting the distress clause, than what I may distinguish as the honest purpose of securing the facility it affords for making his interest money out of the property of his debtor. This purpose is served by a license to distrain the goods of his debtor. To go farther than this, and discover an actual and conscious design to confer and secure a remedy against the property of a stranger, which may chance to be on the premises, by creating the relation of landlord and tenant at a fixed rent, should, in my judgment, require language by which the result is reached without any semblance of force in the construction adopted. Such are the attornment clauses in most, if not all of the cases collected in the judgment in *Kelly's* case, and others to which we have been referred, and such a provision will be found in mortgages like the one in question in *Canada Permanent Building and Loan Society v. Byers*, 19 C. P. 473.

The 17th clause does not seem to me so framed as to aid in construing the distress clause as creating a tenancy. Its object and office are, I think, of a different nature. Setting

aside the consideration that, expressed as it is in the form of a proviso and not of a covenant by the mortgagee, it may be questioned whether it is properly called a re-demise, or whether the right to retain possession till default is not rather so much of his original estate reserved by the mortgagor—something he never parts with, not something conveyed to and received back from the mortgagee—the whole scope of the clause seems to repel the idea that possession is retained as a tenant paying rent. The mortgagor is, “to have, hold, use, occupy, possess, and enjoy the lands, &c., and receive and take the rents, issues, and profits thereof to his own use and benefit, without let, suit, hindrance, interruption, or denial, of or by the mortgagee.” And this right, untrammelled as it is by a word suggestive of a *reddendum*, ceases at the moment the distress clause becomes operative, viz., whenever default occurs. The distress clause authorizes the mortgagee to recover *by way of rent reserved, as in the case of demise* of the lands, &c., the arrears of interest. I have to confess my inability to read this as implying that a demise had, before the default, existed, under which the interest was the rent reserved. The language strikes me as negating any such construction. When the right to recover “as in the case of a demise,” is given—or, taking the full phrase, “to recover by way of rent reserved as in the case of a demise”—the assertion conveyed to my mind is, that there was no demise, and no rent reserved upon any demise, but that it was agreed that when a default occurred the remedy should be the same as it would have been in the case of a demise or when rent had been reserved upon a demise; and this is strongly enforced by the concluding words, which authorize the recovery of the costs “as in like cases of a distress for rent;”—in other words, “in the same way as if you were distraining for rent.” I doubt the propriety of reading this clause as amounting to even so much as a covenant to hold as tenant, at a rent equivalent to the interest, from the time of the default. But taking it to have that effect, the case of *Clowes v. Hughes*, L. R. 5 Ex. 163, is direct authority for holding that it would not justify a distress

until notice from the mortgagees to the mortgagor that they intended to treat him as tenant and no longer as mortgagor in possession.

It is scarcely necessary to remark that the statute which gives the short form of mortgage operates merely to give to the short form the same effect as if the extended language were used, but leaves that language to its own proper force as expressive of the contract of the parties.

There is, however, in the mortgage before us, a clause which is not imported from the statute. To the statutory clause, "and the mortgagor doth release to the company all his claims upon the said lands," these words are added: "and doth attorn to and become tenant at will to the company, subject to the said proviso." The "said proviso" was the defeasance clause.

This attornment stops short of any allusion to rent. By itself it could not give power to distrain. To connect it with the distress clause, so as to construct from the union an attornment at a fixed rent, we should in the first place have to call in the aid of surmise and conjecture, as, in my judgment, no such connection is indicated on the face of the deed. Had it been intended to connect them a few words would have done it, but no such words are here. For reasons already given I do not think it is our duty, nor do I consider it would be proper to supply by inference or surmise, for the purpose of giving power to interfere with the rights of persons who are strangers to the contract, what the contracting parties have not seen fit to express. We do not know that the mortgagor would have consented to execute an instrument which was to have the effect sought to be established, and we cannot make a contract for him. I desire to guard myself against being understood to speak of the creation of a charge for the interest upon the property which was or might be on the premises that should always, or to the extent of a year's interest, have priority over executions against the mortgagor, as being necessarily unjust; and that I am aware is the essence of the present claim. Upon the propriety of such a bargain I express no opinion. But I understand that the

same construction of the document which would in this case sustain the plaintiffs' claim would necessarily affirm the right to distrain a stranger's goods, and I discuss the case with that result in view.

The attornment, which professes to be as tenant at will, is inconsistent with the express provisions of the 17th clause, which secures to the mortgagor the right to possession until default. In the face of this clause the mortgagee could not enter at his will upon the premises. It is the converse of the position in *Morton v. Woods*. There the attornment was for ten years, but was held to create a tenancy at will, by the force of the express power given to the landlord to enter without notice or demand of possession. Here it professes to be at will, but we must read that in connection with the express restrictions on the right to enter contained in the 17th clause, and also contained in a less express form in the proviso immediately following the attornment clause itself. These two consecutive clauses read together in this way: "and doth attorn to and become tenant at will to the company, subject to the said proviso. Provided the company, on default of payment for two calendar months, may, on one calendar month's notice, enter on and lease or sell the said lands." As to the effect of this proviso, see remarks of Mr. Justice Cameron, in *Superior Savings and Loan Society v. Lucas*, 44 U. C. R. 120.

In my opinion, it would be impossible to hold that a tenancy at will was created by this deed, reading all its parts together as we are bound to do. Whether the words, "doth attorn to and become tenant at will," could be read in connection with the distress clause, as a covenant to hold under that tenure from the time of making default, I have not maturely considered; but it appears to me that that is the utmost effect of which the clause is susceptible.

The particular technical character of the tenancy whether at will or of what other nature, is, however, only material in view of the application of the Statute of Frauds, or of our Statute R. S. O. ch. 98, sec. 4, this deed not being executed by the mortgagees. The subject of the statute was not much argued before us. I prefer leaving

it untouched, partly because it was not fully discussed, but principally because, adopting the test put in *Ex parte Jackson*, I cannot find that there was any real tenancy at a fixed rent.

I concur with Mr. Justice Cameron in the opinion expressed by him in the Court below, and agree that we should allow the appeal with costs.

MORRISON, J. A. concurred.

OSLER, J.—It is admitted by the second paragraph of the special case that the mortgagor remained in actual possession of the lands, under and pursuant to the provisions of the mortgage, from the date thereof until after the interpleader issue was directed.

By the terms of the mortgage, he expressly attorned and became tenant at will to the plaintiffs, subject to the proviso for repayment of the principal and interest.

The mortgage contains a proviso that until default of payment the mortgagor shall have quiet possession of the land.

Although default was made, it must be assumed from the admission referred to that the mortgagor continued to occupy as tenant at will, and that the plaintiffs had never determined the tenancy.

The relation of landlord and tenant therefore existed between the parties, and the only other question is, whether it existed at a fixed rent so as to enable the plaintiffs to distrain as landlords, or to enforce their right as such under the Statute of Anne, against property taken in execution against the tenant.

Considerations and arguments which were addressed to us as to the invalidity of attornment clauses in mortgages generally, or because they conflict with the policy of the Chattel Mortgage Act, can have no place in the discussion: "There can be no doubt that such clauses contained in mortgage deeds are valid and operative in themselves, and that they may and ordinarily do create the relation of tenant and landlord between mortgagor and mortgagee, and with it the ordinary right of distress which the law attaches

to that relationship," per Thesiger, L. J., in *Ex parte Jackson, Re Bowes*, L. R. 14 Ch. Div. 743.

For the same reason we ought not, in construing the deed before us, to be influenced by any consideration as to the presumed intention of the parties not to exact or submit to terms, which would place it in the power of the mortgagees to commit the injustice of distraining upon goods of strangers for their own debt. We see from many of the cases which have been cited to us, and from precedents in well known works on conveyancing, that it is not at all unusual to confer upon a mortgagee the additional security which he would have as landlord of his mortgagor, but I take it there is not in that, any more than in what I may call the ordinary case of landlord and tenant, any primary intention of doing injustice to third persons, nor in fact is the injustice greater in the one case than in the other; and in the case before us the mortgagees are only insisting upon their position as landlords, in order to assert a landlord's statutory right where his tenant's own goods are taken in execution.

Is there then anything in the mortgage from which we can see that a rent has been reserved? The instrument must be looked at as a whole. Its value as a security is not to be refined away by subtle criticisms upon isolated clauses. To do so, would be, to "stick in the bark"—to regard the letter, and not the intention and general object of the instrument. "There is no magic in the position of the clauses in a deed. Every clause is part and parcel of the bargain between the parties": *Ex parte National Guardian Assurance Co.*, L. R. 10 Ch. Div. 408. And see *Morton v. Woods*, L. R. 4 Q. B. 306.

The clause upon which the plaintiffs rely, is that numbered 15 in the statutory form: "Provided that the company may distrain for arrears of interest." In its extended form it is an agreement by the mortgagor that if he shall make default in payment of any part of the interest at any of the times limited for payment thereof, it shall be lawful for the mortgagee to distrain therefor upon the said

lands and by distress warrant to recover by way of rent reserved, as in the case of a demise of the said lands, so much of the said interest as shall from time to time be in arrear and unpaid, together with all costs, &c., as in like cases of distress for rent.

The plaintiffs properly relied upon *The Royal Canadian Bank v. Kelly*, 19 C. P., 96, as an authority in their favour on the construction of this clause, as it does not appear that that case was reversed on any of the grounds upon which Mr. Justice Gwynne's decision was founded.

The defendants contend, that the clause operates as a mere license to distrain, the reference to the powers of distress by landlords only shewing how the goods seized are to be taken and disposed of.

Whether that would be the more reasonable construction to place upon it if it stood alone it is not necessary to determine, for the plaintiffs are in my opinion entitled to read it in connection with the attornment clause, to which it is in its object, although not in its position in the deed, intimately related, and which is otherwise useless and inoperative, if it is not positively detrimental to the mortgagees. Dicta of the Court of Appeal in *re the Stockton Iron Furnace Co.*, L. R. 10 Ch. D. 335; *Ex parte Punnett*, L. R. 16 Ch. D. 226.

So reading it, it appears to me that the proper construction of the distress clause is, to treat the interest or arrear of interest as being what it is there described as being, viz., the rent reserved, for it is *in that character*, or *as being such*, that the mortgagees are authorized to distrain for it, and to distrain, moreover, as in the case of a demise of the land from the mortgagees to the mortgagor, there being in fact in the same instrument such a demise acknowledged as existing. See and compare the language of the attornment and distress clauses in *Pinhorn v. Souster*, 8 Ex. 763 "to distrain on the said premises as landlords may for rent reserved on leases for years." *Brown v. Metropolitan Counties, &c., Society*, 1 E. & E. 832, "the same powers of entry and distress as are by law given to

landlords for the recovery of rent in arrear;" and *Turner v. Barnes*, 2 B. & S. 435, "subject to powers of distress and entry and to all usual remedies as in leases of like property."

I think Mr. Justice Gwynne takes a just distinction between the language of this clause and that used in the cases of *Chapman v. Beecham*, 3 Q. B. 730; *Pollett v. Forrest*, 11 Q. B. 962; and *Wilkinson v. Goodier*, 10 Q. B. 957, which is clearly that of comparison or illustration only.

There is nothing, as it seems to me, in the objection that if the interest or arrears of interest are treated as the rent it is not a fixed or certain rent. It is always capable of being ascertained or reduced to a certainty, which is all that is necessary, and much more readily here than in *Daniels v. Gracie*, 6 Q. B. 144, where the rent reserved on a demise of a marl pit and brick mine was eight pence per yard for all the marl got out of the pit and one-eighth per thousand for all the bricks made out of the mine.

But it is said that the attornment clauses is inconsistent with the other clauses in the deed, and in particular with that which immediately follows it, "Provided that the company on default of payment for two calendar months may, on one calendar month's notice, enter on and lease or sell the said lands," and the subsequent clause, which provides that until default in payment the mortgagor shall have quiet possession of the land. As to the first, when read in connection with the covenant that the company shall have quiet possession on default, I think it means no more than that they shall not sell or lease the lands until after a certain default and notice, but does not interfere with their right to recover possession by ejectment at any time after default: *Stevenson v. Culbertson*, 12 C. P. 79; *Copp v. Holmes*, 6 C. P. 373.

There was, however, the same inconsistency or repugnancy in the deed which was in question in *Pinhorn v. Souster*, 8 Ex. 763, where there was a covenant for quiet enjoyment until default in payment, and also that the mortgagor should hold as tenant at will at the rent agreed

on. It was held that a tenancy at will was created, and that the latter clause was not inconsistent with the general provisions of the instrument. The decision in *Pinhorn v. Souster*, was entirely concurred with in *Brown v. The Metropolitan Counties, &c., Society*, 1 E. & E., 832; and see also *Turner v. Barnes*, 2 B. & S. 435. In both of these cases the case of *Walker v. Giles*, 6 C. B. 662, which is relied on as authority for rejecting the attornment clause, was disapproved of or distinguished. But even if the attornment clause is repugnant to the other clauses, it appears to me that inasmuch as it is not repugnant to the general intention apparent on the whole instrument, viz., the creation of a mortgage and of a tenancy and the reservation of a rent as security for the interest, we ought to give effect to it rather than to the others, as being the earlier clause, and the express language and agreement of the grantor or mortgagor: 2 Bl. Com. (Kerr) 387 and note; 4 Cru. T. 33, ch. 19, secs. 8, 13; *Morton v. Woods*, L. R. 4 Q. B. 293, 305, 306.

The case of *Clowes v. Hughes*, L. R. 5 Ex. 160, which was strongly relied on by one of the counsel for the appellants appears to me to be entirely inapplicable. The mortgagor there was not to become tenant until after default in payment, and it was held that the mortgagees before they could distrain, were bound to have given him notice that they intended to treat him as tenant and not as mortgagor in default.

I think the judgment of the Court of Queen's Bench is right, and that the appeal should be dismissed.

Appeal allowed.

NOTE.—This case has been carried to the Supreme Court, and stands for argument.

CLARKE ET AL. V. BARRON.

Nonsuit—Ground not taken at trial.

The verdict herein was set aside by the County Court, and a nonsuit entered upon a ground not taken as a defence at the trial or in the rule *nisi*.

Held, reversing the judgment, that the learned Judge erred in giving effect to the objection, which, if taken at the trial, would have been met by an amendment.

As the evidence shewed that the plaintiff was entitled to succeed upon the merits, the appeal was allowed, and the rule in the Court below discharged.

Appeal from a judgment of the County Court of York.

This was an action on a note for \$285.68, payable to the plaintiffs signed, "Gow, English & Barron." Persons of the name of Gow, English, and the defendant, were partners in trade as bakers, and the name of the company, in the declaration of partnership, was stated to be "The Toronto Baking Company." The plaintiffs supplied them with flour from the beginning of their partnership to its dissolution. The note in question was made and given by Gow, one of the firm, being the balance due the plaintiffs for flour upon the closing of the firm's account with the plaintiffs.

The case was tried before the learned Judge of the County Court. From the notes of the trial it appeared that the principal defences relied on for the defendant were that the note was made by Gow after the dissolution of the defendants' firm, and that the note was not duly stamped. At the close of the plaintiffs' case the only objection taken was, that the note was not properly stamped; and at the close of the whole case no other objection appeared. The learned Judge, who tried the case without a jury, entered a verdict for the plaintiffs, reserving leave to the defendant to move.

In the following term the defendant moved and obtained a rule *nisi* calling on the plaintiffs to shew cause why the verdict should not be set aside, and a nonsuit or verdict entered for the defendant, on the ground that the first issue (*non fecit*), ought to be found for defendant, the alleged

partnership between Gow and English and defendant having terminated before the making of the note, and on the ground that the defendant was entitled to succeed upon the issues on the third and fourth pleas, viz., payment, and that the note was not duly stamped. The learned Judge set aside the verdict for the plaintiffs, and ordered a nonsuit to be entered, upon the ground that no one had a right to sign a note, "Gow, English & Barron," binding the defendant.

The defendant appealed.

The case was argued on the 10th May, 1881 (a).

E. Douglas Armour, for the appellants.

Falconbridge, for the respondent.

July 8, 1881. MORRISON, J. A., delivered the judgment of the Court.

The only question the learned Judge had to decide upon the rule which he himself had granted was, whether a nonsuit or verdict for defendant should be entered upon either or both of the grounds mentioned in the rule *nisi*. Instead of doing so, the learned Judge took upon himself, inadvertently I assume, to enter a nonsuit upon a ground not taken by the defendant in his rule, viz., that the note was not properly signed to bind the partnership, a ground of defence quite inconsistent with the rule *nisi* which the plaintiffs had to shew cause against, and a defence which, if relied on at the trial and distinctly pressed, and if then held fatal to the plaintiffs' case by the learned Judge, would have resulted in an application to amend by adding the common count for goods sold and delivered, which the learned Judge, no doubt, would have granted, as it was his duty to do so, the evidence clearly shewing that the plaintiffs were entitled to recover—an amendment which we would now make if we had the power to do so. The notes shew that at the trial such an amendment was asked, but it does not appear it was either allowed or refused.

(a) *Present*—SPRAGGE, C.J.O., BURTON, and MORRISON, JJ.A.

On the whole, considering that such a defence was not distinctly taken at the trial, and as the rule *nisi* is silent as to this ground, we are of opinion that the ordering a nonsuit under the circumstances was, on the part of the learned Judge, a manifest error and mistake. We see no object to be gained in sending the case to another trial. We have the whole material before us, and no substantial wrong will be occasioned to the defendant by our decision. We have considered the question of the imperfect stamping of the note, and we see no ground disentitling the plaintiffs from recovering on that issue.

Appeal allowed. No costs of the appeal to either party. The rule *nisi* in the Court below to be discharged.

Appeal allowed, without costs.

LAWLOR V. LAWLOR ET AL.

Estate tail—Mortgage of.

Although under R. S. O. ch. 100, sec. 9, a mortgage in fee simple by a tenant in tail vests the fee simple in the mortgagee, the registration of a discharge of such mortgage, in accordance with R. S. O. ch. 111, sec. 67, does not reconvey the estate to the tenant in tail barred of the entail; it operates only as a reconveyance of the original estate of the mortgagor.

APPEAL from the decree of Blake, V. C.

The bill in this case was filed by the heirs-at-law of Michael Lawlor, other than the eldest son, against him, for the purpose of obtaining a declaration that the estate tail of Michael Lawlor had been barred and enlarged into a fee simple by the execution by him of a mortgage in fee, dated 8th February, 1867, subject to the usual proviso for redemption to be found in the Short Forms of Mortgages Act, and which mortgage had been discharged by the registration of a certificate in the manner prescribed by the Registry Act of Ontario.

The bill further prayed that a lease of said lands, made by the eldest son of Michael Lawlor to one Staunton, should be reformed by making all the children of Michael Lawlor parties thereto as lessors.

The learned Vice-Chancellor made a decree declaring the estate tail barred, and granted the relief prayed for (a). The appeal was against that decision.

The case was argued on the 2nd June, 1881 (b).

T. S. Plumb, for the appellants. The first half of section 9, R. S. O., ch. 100, applies to the form of mortgage usual

(a) The judgment below was given on the argument, and is not reported. The learned Vice-Chancellor said he had already had occasion to consider the question, and agreed with the opinion expressed by Proudfoot, V. C., in *Re Lawlor*, 7 P. R. 242.

(b) *Present*.—SPRAGGE, C. J. O., BURTON, PATTERSON, and MORRISON, JJ.A.

in England, which provides for re-conveyance, and was intended to obviate questions of resulting trusts, such as arose in *Jackson v. Innes*, 1 Bligh 104. See *Sugden's Real Property Statutes*, 2nd ed., pp. 199, 200. A mortgage conditioned to be void upon payment in accordance with the Ontario Short Form of Mortgages Act is within the excepted cases provided for by the latter half of the section: *Shelford's Real Property Statutes*, 8th ed., 330, 331; *Re Dolsen*, 4 Chy. Ch. 36. Compare the English form of mortgage of copyholds where the condition is to be void, and *Davidson's Precedents*, 3rd ed., vol. 2, p. 583; *Fisher on Mortgages*, 3rd ed., vol. 2, p. 1067, sec. 1716. Again, section 67 of R. S. O. ch. 111, provides that the registration of a certificate of discharge shall be as valid and effectual in law as a conveyance to the mortgagor, his heirs, &c., or any person lawfully claiming by, through, or under him or them of the original estate of the mortgagor, and has therefore the same effect as a deed resettling the estate to the former uses, and the mortgagor was in as of his old estate: *Re Dolsen*, 4 Chy. Ch. 36.

Stewart Tupper, for the respondents. The single point for decision is, whether a mortgage of the fee simple under R. S. O. ch. 100, sec. 9, by a tenant in tail, has the same effect as a disentailing deed—in other words, enlarges the estate tail to a fee simple—or whether it merely bars the estate tail for the purposes of the mortgage. That the execution of such a mortgage *ipso facto* converts the fee tail into an estate in fee simple absolute is, we submit, clear both from the language of the section and the authorities. It is true that were it not for the express provisions of the section just referred to there would be nothing to take this case out of the ordinary rule, and the resulting interest would have been to the mortgagor as tenant in tail; but by the express words of the section a mortgage by a tenant in tail of any freehold interest, other than an estate *pur autre vie*, operates as a bar of the entail absolutely, both at law and in equity, and the beneficial interest results to the tenant in tail discharged of the entail. That it was intended that such a mortgage should have this effect

is clearly shewn by the latter portion of the same section, which provides that where the mortgage is merely of an estate *pur autre vie* or lesser estate, it shall in equity be a bar only so far as may be necessary to give full effect to the mortgage, whereas in the other case the estate tail is absolutely barred. The point in question came before Proudfoot, V. C., in *Re Lawlor*, 7 P. R. 242, on the petition of the guardian of the children for advice. While the Vice-Chancellor felt himself precluded from giving any advice, owing to all parties not being represented, he expressly held the construction we now contend for to be the true meaning of the section, and that all the children were equally entitled. All the best commentators have expressed the same opinion: *Leith's Real Property Statutes*, 338; *Coote on Mortgages*, 4th ed, 330; *Sugden's Real Property Statutes*, 199, 200; *Davidson's Precedents*, 3rd ed., vol. 2, 583; *Hayes on Conveyancing*, 5th ed., 183, 184. See also *Trust & Loan Co. v. Fraser* 18 Gr. 19; and *Ostrom v. Palmer*, 3 App. R. 61. The contention that this mortgage was an "interest lien, charge or incumbrance" within the meaning of those words as used in the latter part of the section, cannot be upheld, as here there was a conveyance of the fee simple, not merely a charge without any estate to secure it. The Court will not place the narrow construction suggested by the counsel for the appellant, on the words "original estate of the mortgagor" in the certificate of discharge. If these words had occurred in a similar provision expressly relating to the discharge of mortgages by a tenant in tail they might possibly occasion some difficulty; but occurring as they do in a general Registry Act, in a section providing a short mode by which, on payment of the money secured by mortgage, the reconveyance of all kinds of estates might be effected without a formal conveyance, it is submitted that the clear intention was simply to revest in the mortgagor the estate which he conveyed to the mortgagee on the execution of the mortgage, and that no further effect was contemplated.

Plumb, in reply. *Re Lawlor*, 7 P. R. 242, is merely an

obiter dictum, and therefore no precedent. *Dynes v. Bales* 25 Gr. 598 and the text writers and cases cited, all refer, either to the English form of mortgage, which provided for a reconveyance, or to circumstances where the mortgagor has made default and been foreclosed, which is admitted to be a bar of the estate tail.

July 8, 1881. BURTON, J.A.—The point in question in this appeal came on a previous occasion before the Court, on a petition by the guardian of the infants asking advice under the Property and Trusts Act, 29 Vic. c. 28, but as all the proper parties were not then before the Court, Proudfoot, V.C., declined to take any action. He did, however, express a clear opinion that the estate tail was barred, and referred not only to the remarks of the English commentators upon the Imperial Act, but also to Mr. Leith's comments on our own statute in support of his opinion. It must be borne in mind, however, that in that case as the mortgage was still outstanding, and the mortgagees seized of an estate in fee simple, the present question did not properly arise. It appears, however, to have been assumed rather than decided previously to the judgment now appealed against that such would be the effect in a case like the present.

Mr. Plumb, for the infant, contended that a mortgage like the one before us, conditioned to be void upon payment, is within the excepted cases provided for in the latter portion of section 9 of the Act respecting the Assurance of Estates Tail, R.S.O. c. 100, in other words that it was "A charge, lien, or incumbrance," within the meaning of that section of the Act. But this contention is manifestly untenable, those words referring obviously to a charge without any estate to secure it, in which case the entail will be affected only to the extent of the charge, although there be an express declaration of intention that the deed or instrument shall operate as a complete bar of the entail, as distinguished from the cases referred to in the earlier part of the section. The conveyances or dispositions there referred to convey an estate, and although they may be so made as to effect

only a partial alienation, yet if made so as to convey the fee simple they would not be controllable by any declaration or implication of a contrary intention appearing on the face of the deed, just in the same way as a tenant in tail, suffering a recovery with effect—before the passing of the Act—necessarily acquired a fee simple absolute although not desiring perhaps a total destruction of the settlement, and even though contrary to the declared purpose of the assurance.

It is unnecessary to consider what might be the effect of a mortgage framed as this is—conditioned to be void on payment at a certain day—if the money had been paid strictly in conformity with the condition, because, although not apparent on the face of the case, it was admitted on the argument that the condition was not performed, and the estate in the mortgagees had become absolute.

If a tenant in tail makes a mortgage in fee with a proviso for redemption in the usual form adopted in England, that is to say, "provided always, and it is hereby agreed that on payment at the day named therein, the mortgagee shall reconvey the mortgaged premises to the use of the mortgagor, his heirs or assigns, or as he or they may direct," he will thenceforth be entitled to the equity of redemption discharged from the entail, and as before remarked, any expression of intention to the contrary, even if stated in express terms, will not affect his right.

To give effect to that intention, the estate tail would have to be re-limited subject to the interest created, and this, I assume, might have been done in the mortgage deed, for although the statute denies effect to a mere intention, however expressed, yet it does not prohibit the express limitation of the old or any other uses which the tenant in tail may choose to introduce.

This has not been done, and the title of the present claimant in tail must depend altogether upon the effect to be given to the 67th section of the Registry Act, R. S. O. c. 111, which provides that the registration of a certificate of discharge shall be as valid and effectual in law as a release

of such mortgage, and as a conveyance to the mortgagor of the original estate of the mortgagor, that is to say, as I read the Act, not of the fee simple which had been conveyed, but as a re-settlement, of the estate upon the same terms as the mortgagor held it at the time he executed the mortgage.

This would seem to be the proper construction to be placed upon the words of the enactment and to be founded on good sense and the ordinary rule in cases of mortgages, that rule being that when the reservation of the right of redemption, or the prescribed destination of an estate when re-conveyed, does not in terms follow the state of the title as existing at the time of the mortgage, a strong indication of intention is necessary to transfer or modify the beneficial ownership of the equity of redemption, the usual intention being that a mortgage shall be what it professes to be and nothing more.

Are we then called upon to say that when the Legislature declares the effect of the registration of a certificate of discharge to be that it shall be as effectual as a conveyance to the mortgagor of his original estate, that it means something different? As a general proposition it is found in practice that the estate of the mortgagor at the time of the conveyance and the estate agreed to be re-conveyed are the same, but full effect must be given to the words of the Act, and it is fair to assume that the framers of the enactment had in their mind such a case as the present, and that the parties have contracted also upon that assumption. If that be the correct view to take of the statute the release here when registered operated as a re-settlement of the estate upon the uses declared by the original settlement.

The learned counsel for the respondents contended that the case was in fact concluded by the decision in *Ostrom v. Palmer*, 3 App. R. (1, in this Court, but that case merely decides that the consent of the protector to the settlement, which was necessary in that case, was sufficiently shown, and that the mortgagee took an estate in fee simple. What would be the effect of registering a statutory dis-

charge could not arise in that case as the mortgage was still outstanding. The appeal, therefore, should be allowed, and the decree reversed.

SPRAGGE, C. J. O.—I agree in opinion with my Brother Burton. I think Mr. Tupper is right so far as this, that the giving of the mortgage vests the fee simple in the mortgagee, and if it be not redeemed that estate remains in him. It is an anomaly that it should be so, for the estate conveyed to the mortgagee is greater than the mortgagor had in himself. It is what may be called a tortious operation that is given by the Statute to the mortgage.

On the other hand, we cannot deny to a registered certificate of discharge the effect which the Statute gives to it, which is, that it "shall be as valid and effectual in law as a release of such mortgage and as a conveyance to the mortgagor his heirs * * of the original estate of the mortgagor." The contention of Mr. Tupper for the heirs at law would give to the registration of discharge not the effect of revesting the land, "as of the original estate of the mortgagor," but of a different estate. That would not be in accordance with the Act, but a substantial deviation from it.

PATTERSON, J. A.—I am also of opinion that we must allow this appeal.

The matter lies within a narrow compass.

The plaintiffs and defendants both claim under Michael Lawlor, who was tenant in tail.

The defendant J. L. Lawlor is the heir in tail, and is in possession of the lands by his co-defendants, who are his tenants.

The plaintiffs claim to be tenants in common with J. L. Lawlor, as heirs general of Michael Lawlor, on the ground that the estate tail of Michael had become enlarged to a fee simple, and that at the time of his death Michael was seized in fee simple.

Michael had made a mortgage of the property in the

short form given by our Statute, by which he conveyed the property in fee simple to the Freehold Permanent Building and Savings Society. He paid off the mortgage in his life-time, though not till after the day limited in the proviso for redemption or defeasance, and obtained and registered the ordinary statutory discharge.

The contention for the plaintiffs is, that the mortgage was a disentailing deed within the effect of the Act respecting the assurance of Estates Tail, which is now found in R. S. O., c. 100; that the mortgagees therefore took an estate in fee simple; and that the estate which reverted in their ancestor by the operation of the redemption of the mortgage and the registry of the certificate of discharge, was the estate of which the mortgagees had been seized, and not the original estate tail.

Without referring in detail to the authorities cited by counsel, it may, for the purpose of the present decision, be assumed, as was held by Proudfoot, V. C., in *Re Lawlor*, 7 P. R. 242, when dealing, as I understand, with other mortgagees upon lands held in tail, that the mortgagees were seized in fee simple, and that if they had conveyed their estate to the mortgagor he would, taking under them, have been also seized in fee simple.

The question is, whether the statutory discharge of mortgage has the same effect.

It is not a deed, and apart from the Statute would not be a reconveyance. It has necessarily the effect given to it by the Statute and no further effect. That effect is declared in R. S. O. ch. 111, sec. 67, in these words: "And the same shall be deemed a discharge of such mortgage, and such certificate so registered shall be as valid and effectual in law as a release of such mortgage, and as a conveyance to the mortgagor, his heirs, executors, administrators, or assigns, or any person lawfully claiming by, through, or under him or them, of *the original estate of the mortgagor*." The original estate having, in this instance, been an estate tail, the operation of the registration of the discharge was therefore to re-settle the original limitations. We cannot

attribute to it any other effect without adding to or otherwise qualifying the words of the Statute.

MORRISON, J. A., concurred.

Appeal allowed.

NOTE.—This case has been carried to the Supreme Court, and stands for argument.

McDONALD ET AL. V. DAVIDSON.

Trustee—Compensation—Discretion of Judge.

What is proper compensation to be allowed to a trustee for his management of the trust estate is a matter of opinion, and even if, in granting the allowance, the Court below may have erred on the side of liberality, that alone is not a sufficient ground for reversing the judgment. Where the Master at Guelph had allowed \$125, which the Court, on appeal, increased to \$250, this Court refused to interfere.

This was an appeal from an order of the Court of Chancery, made by Blake, V. C., allowing the sum of \$250, instead of \$125, the amount allowed by the Master at Guelph, as compensation to the defendant for services rendered to the plaintiffs as their trustee, in relation to matters of considerable interest and value, which were in question between the plaintiffs, three unmarried ladies, and their brother Donald McDonald. It was shewn that the settling of these questions required on the part of the trustee firmness, temper, tact, and address; and it was because the defendant was known to possess these qualities that his name was suggested to the plaintiffs by Mr. Lemon, barrister, of Guelph, as their trustee.

It appeared that the person to be dealt with, the plaintiffs' brother, was a person with whom it was difficult to deal; and the matters in question between them were complicated, and spread over several years. The settling of these matters involved many interviews with the plaintiffs themselves, with their brother, and with Mr. Lemon's firm; and it

was apparent from the evidence that they involved a good deal of the defendant's time and attention from the month of February to the Autumn, and, that the matters in question were brought to a successful result by the defendant for the plaintiffs.

The case was argued on the 23rd of May, 1881 (a).

Rose, for the appellant. A review of the evidence shews that the allowance made by the Master to the defendant for his care and trouble was amply sufficient; and the learned Vice-Chancellor should not have increased it. It has been expressly found by the Master that the defendant was not warranted by the facts in claiming that the services in question occupied so much of his time; and it is clear that the sum of \$250 was wholly disproportionate to the sum he was entitled to claim. The Master was more competent to fix the correct remuneration, as he saw the witnesses and could more accurately weigh the evidence than an appellate Judge.

Walter Cassels, for the respondent. The duties which devolved upon the respondent, as trustee, were of the most difficult nature, and such as to entitle him to the full amount allowed him by the decree. The Master was not justified by the evidence in finding that the respondent had sworn falsely as to the time occupied in the execution of the trust. By analogy to the sum allowed to lay arbitrators, the amount allowed by the learned Vice-Chancellor was very moderate: R. S. O. ch. 64. Under all the circumstances, the case is clearly one in which this Court should decline to interfere with the discretion exercised by the Court below.

July 8, 1881. SPRAGGE, C. J. O., delivered the judgment of the Court.

It may be that the time estimated by the defendant and

(a) *Present*.—SPRAGGE, C.J.O., BURTON, PATTERSON, and MORRISON, JJ. A.

by Mr. Lemon as consumed by the defendant in these interviews and investigations may not be fully made out; but that he earned the compensation allowed to him by the Vice-Chancellor is, we think, made out. If we thought, indeed, that the amount allowed were a rather liberal one for the defendant, we ought not, we think, to disturb it; for, what is proper compensation is a matter of opinion, upon which different minds may well differ; and if we thought that the learned Vice-Chancellor had erred somewhat on the side of liberality, that would not be a sufficient reason for reversing his judgment.

The only reason that can be urged for allowing this appeal is, that the Master at Guelph, to whom the question of quantum of compensation was referred, allowed to the defendant only the sum of \$125. My own individual opinion is, that the Master was wrong upon the evidence in allowing that sum as compensation; and that he was not warranted in saying, as he has said in his judgment, that it was incredible, or as he puts it incredible to him, that the time sworn to by the defendant was employed upon the duties for which he claims compensation; and this language of the Master is, as I think, all the less warranted when we find the evidence of the defendant corroborated by that of Mr. Lemon, of John Davidson, and of Frederick Marcon.

In our opinion the learned Vice-Chancellor was right; and we can but add our regret that his decision in this matter should have been considered by the plaintiffs a proper subject for appeal to this Court.

The appeal is dismissed, with costs.

Appeal dismissed.

IN RE MORTON AND THE CORPORATION OF THE CITY OF ST. THOMAS.

Dedication—Lanes—Registered plan.

In 1856, the owner of lot five registered a plan shewing a sub-division of it into six lots with a lane running through the centre, which was intended for the use of the occupants of the lots adjoining it. He afterwards sold some of the lots, but they were all re-conveyed to him. The lots were always fenced in as one property till 1876, when he sold all the lots and the lane to the bank, by whom a building was erected, the fences remaining as they had been until removed when the building was in progress, and being afterwards replaced by a new closed fence. In 1880, at the instance of one M., the owner of the adjoining lot four, who had recently, at his own expense, laid out a lane across his lot in continuation of the lane in lot five, and conveyed it to the corporation, a by-law was passed by the council opening the lane on lot five. It was shewn that M. was the only person interested in having the lane opened.

OSLER, J., quashed the by-law on the ground that it had not been passed in the interest of the public, but simply to subserve the interests of an individual.

Held, dismissing the appeal, that the registration of a plan of a sub-division of a town lot, and sales made in accordance with it, does not constitute a dedication of the lands thereon to the public, and the council had therefore exceeded their powers in passing the by-law in question.

Held, also, that the by-law, being passed in the interest of a particular individual, was properly quashed.

This was an appeal from the judgment of Mr. Justice Osler, (a) sitting for the Court of Common Pleas, quashing a

(a) OSLER, J.—The material facts disclosed by the affidavits are that Mr. E. W. Harris bought town lot No. 5, on which the lane in question was laid down, in the year 1856, and in that year subdivided it into six lots, three of which fronted on Talbot street and three on Pearl street, separated by the lane in question, which Mr. Harris swears was intended as a private way for the use of the purchasers of the subdivision lots. The plan was duly registered. In the following year he conveyed three of the lots in accordance with the plan, taking mortgages for the purchase money from the vendees of two of them. None of the purchasers ever went into possession, and Harris alone retained it and used and rented the whole property as his own in one parcel. After some years the mortgagors being unable to redeem, the lots were all reconveyed to him. The lane was never opened, nor was the plan ever recognized further than by its registration and the conveyances referred to, and the lot, as I have said, always remained fenced in and used as one entire parcel of land until it was conveyed by Harris to the Molsons Bank, in May, 1876, a period of nearly twenty years. After this, and until the bank premises were finished the fences around the lot were down in some places for about two years, but the lane was never used, or any rights claimed in it by the corporation or the public, or any one else, and the bank subse-

by-law of the corporation of the city of St. Thomas, passed in August, 1880, to authorize the opening of a lane or street laid out upon a plan of sub-division of town lot five on the corner of Talbot and Pearl streets, in that city.

It appeared that lot five was a tract of land considerably less than half an acre in extent, bounded on the south by Talbot street, on the east by Pearl street, on the north by Curtis street, and on the west by lot four. It belonged to a Mr. Harris, who in 1856 caused a plan to be prepared and filed in the registry office, showing a sub-division of it into six small building lots, with a lane twelve feet wide running through the centre

quently enclosed the whole in a new fence, using the rear of the lot, including the lane, as a garden.

I think it appears quite clearly from the affidavits that Mr. Harris, and those claiming under him, retained the exclusive possession of the whole lot as one parcel, entirely disregarding the subdivisions, except as I have mentioned, from 1856 to October, 1880, when the fences which the bank had erected were torn down, by order of the council, and the lane thrown open; and further, that no right to the lane was ever claimed or relied upon by the owners of any adjoining lot until shortly before the month of June, 1880.

The by-law for opening the lane was passed on the 3rd of August, 1880, in pursuance of notice given under the Municipal Act, in the previous June, and it is sworn, and not denied, that the only person who petitioned for its passage was Dr. Duncan McLarty, formerly mayor of the town, the owner of the adjoining lot No. 4, who has recently erected buildings across the whole front of that lot, and laid out, at his own expense, and conveyed to the corporation a lane across it, in continuation of the lane alleged to exist on lot 5.

It clearly appears that no one other than Dr. McLarty and his tenants of lot 4 are or can be interested in the opening of the lane in question, except as the owner of lot 3 may become interested therein by the opening of the lane dedicated by McLarty across his own lot; and it is sworn that McLarty has indemnified the corporation against the costs of the present litigation. This statement appears for the first time in the affidavits in reply, which also shew more precisely than those filed on obtaining the rule that the by-law was passed by the council at Dr. McLarty's instance. As, however, the facts sworn to were not controverted on the argument, I assume that they are substantially true.

So far as regards the objections which have been made to the by-law, on the ground that proper notices, &c., were not given of the intention of the council to pass it, I do not think they are entitled to weight, as the applicant's attorney attended before the council and objected to the passage of the by-law.

On the ground chiefly argued, viz., whether there had been an irrevocable dedication of this lane so as to entitle the corporation at any distance of time to pass a by-law to open it as a road, I should have hesitated

of the tract from Pearl street to lot four, three of the building lots being south of the lane and fronting on Talbot street, and three north of the lane, and four fronting on Pearl street. The lane was intended for the use of the occupants of the lots adjoining it. After the filing of the plan Mr. Harris sold some of the building lots, but the purchasers failed to pay for them and they all came back by reconveyances to him. The purchasers never occupied them, but the whole of lot five continued to be fenced in as one property, and to be occupied and cultivated by a tenant of Mr. Harris, until 1876, when he sold the whole to the Molsons Bank, conveying to the Bank the six building lots by an ordinary deed, and by another

long before determining the question in their favour. As at present advised, I should be disposed to hold that where a lane or street, laid down upon a plan of subdivision by a private person, had never been actually opened for public use, although sales had been made according to the plan, yet if the whole property again came into the hands of the original owner, as in this case, the public or owners of adjoining lots would have no right as against him in the streets or lanes laid down upon the plan, and so far as he was concerned he would, as regards his title, be in the same position as if he had merely registered the plan and had not sold under it.

But I dispose of the case on a different ground.

I think the by-law should be quashed, because the council in passing it were not using their powers, if they had any in the particular case, in good faith in the interest of the public, but simply to subserve the interests of private persons. No one was interested in having this lane opened but Dr. McLarty, the owner of lot No. 4, who, in order to benefit his own property at the expense of his neighbour, procured the council to open a lane which had apparently been intended for the use only of the owners of the sub-divisions of lot 5, but which had never been in fact opened or used, and that lot not being in fact sold in the sub-division lots, could be of no possible use to any one but the owner of lot 4, for whom it had never been intended. Corporations are trustees of their powers for the general public, and when they prostitute them for the benefit of one individual at the cost of another, the general public not being interested, their action will be restrained by the Courts.

If the lane in question is a highway, the owner of lot No. 4, or any one else, may test the question in another manner, but for the reason I have given, I think that a by-law, passed as the one in question was passed, cannot stand, and the rule will therefore be absolute to quash the same with costs. See *Re Burritt and The Corporation of Marlborough*, 29 U. C. R. 119; *Re Webster and The Corporation of the Township of West Flamborough*, 35 U. C. R. 590; *Re Vashon and The Corporation of East Hawkesbury*, 30 C. P. 194.

deed granting, releasing, and quitting claim to the Bank, "the lane twelve feet in width lying between sub-lots 1, 2, 3, and 4, in the registered plan and survey, made," &c.

The Bank erected a building upon the Talbot street front, the fences remaining as they had been until removed when the building was in progress and being afterwards replaced by a new closed fence. The owner of lot four was a Dr. McLarty, who had been Mayor of St. Thomas. At his instance the council passed the by-law in question, in pursuance of which the officers of the corporation broke down the fence, and opened the lane.

The case was argued on the 6th June, 1881. (a)

A. J. Cattnach, for the appellants. We submit that the onus was on the respondent to prove that the by-law was passed on the interest of an individual, which he has failed to do; on the contrary the evidence shows that it was passed in the public interest. It must be held that the by-law is regular and proper so long as it conforms with a registered plan, as this one does. See *Regina v. Rubidge*, 25 U. C. R. 299. A registered plan cannot be cancelled or ignored in any case, or at any rate where, as in this case, sales have been made, except by the registration of a new survey and plan, or by amendment, as pointed out in section 84, of R. S. O. ch. 111, and sec 72 ch. 146. The registration of the plan is complete proof of dedication; and Harris's statement now of what his intention was in laying out the lane in question, if admissible at all is not sufficient to limit the right of using the lane to the owners of the land covered by the plan, or to exclude the by-law: *O'Brien v. Village of Trenton*, 6 C.P. 350; *Rowe v. Sinclair*, 26 C. P., 233; *Regina v. Boulton*, 15 U. C. R. 272; *Regina v. Spence*, 11 U. C. R. 31; *Rex v. Laurie*, 1 Camp. 263; *Wood v. Veal*, 5 B. & Ald. 54. No exclusive user or assertion of right of the land by Harris or those claiming under him is shewn inconsistent with the right to

(a) Present—HAGARTY, C.J. Q.B., BURTON, PATTERSON, AND MORRISON, JJ.A.

pass the by-law. The moment a plan is registered the freehold of all roads or lanes shewn on the plan becomes vested in the Crown, unless some reservation appears on the face of the plan, and no prescriptive right can then be claimed so long as the plan remains unchanged: R. S. O. ch. 174, sec. 487. By sec. 489 of the same statute the possession of such lanes or roads is vested in the municipality, and therefore no inference can be raised against the corporation or in favour of the applicant by reason of their possession or user. The Statutes of Limitations do not apply to such a lane as this, and the length of user would not, therefore, exclude the by-law: *Nash v. Glover*, 24 Gr. 219; and if they do, there has not been uninterrupted possession for twenty years by Harris and his assigns, which would be necessary to give a prescriptive right: *Mykel v. Doyle*, 45 U. C. R. 65.

T. Hodgins, Q.C., for the respondent. That the by-law in question was passed in the interest of the owner of the adjoining lot and for the benefit of his tenants is beyond dispute. It was moreover shewn that the lane was a *cul de sac* and of no public benefit as a highway. By the registration of the plan no legal right was conferred on the public or any individual to enforce the opening of the lane; and any right which accrued after sales of the lots was a right in the purchasers of such lots to restrain the owner from diverting the ground appropriated to such lane to other purposes: *Rossin v. Walker*, 6 Gr. 619; *Cheney v. Cameron*, 6 Gr. 623. There was no dedication of the proposed lane to the public by the mere registration of the plan. Such registration cannot be held to be a higher act of dedication than the actual opening of the lane, and in both cases an intention against dedication may be inferred from placing any obstruction, such as a gate or chains, which would prevent a user; and the owner in opening the lane in question according to such plan could have placed obstructions to limit the right of user: *Harrison's Municipal Manual*, 4th ed., 477, 478; *Healey v. Corporation of Batley*, L. R. 19 Eq. 375; *Beveridge v. Creelman*, 42 U. C. R. 36; *Carpenter v. Gwynn*, 35 Barb. 395; *Gray v. City of*

Montreal, 3 Legal News 402. Dedication being a question of fact, the evidence of Harris as to the limited dedication of the proposed lane to the purchaser of the lots adjoining thereon was clearly admissible: *Belford v. Haynes*, 7 U. C. R. 464; *Johnson v. Boyle*, 8 U. C. R. 142. Inasmuch as the whole of the lots revested in Harris, it was competent for him, as owner in fee of the whole property, to convey the same free of any easement or right of user to the Bank. Moreover, the plan was registered under 9 Vic. ch. 34, sec. 33, for the more convenient description of the sub-division, and for the purposes of the separate assessment of the sub-divisions; and the latter part of sec. 84, R. S. O. ch. 111, could not apply to any alterations of such registered plan, for prior to the passing of the by-law in question there were no purchasers of the lots, or "parties concerned," to be notified of any application to alter the plan, and there had been no dedication of the lots to the public, which would have warranted a notice to the appellants as "parties concerned" in respect of any alteration.

July 8, 1881. BURTON, J. A.—Notwithstanding the additional evidence tendered upon the hearing of this appeal, one cannot avoid seeing that the corporate powers of the municipality are in this case attempted to be exercised, not in the interest of the general public, but for that of a particular individual, and we might have refused to interfere with the decision of the learned Judge, who made the order appealed from on that ground; but as a good deal of misapprehension exists throughout the country in reference to the right of a municipal corporation to compel the owner of land to open for the general use of the public, and without compensation, lanes or alley ways upon his property from the simple circumstance that he has surveyed it into smaller parcels and registered a plan of such sub-division, and sold one or more lots to purchasers, we have thought it better to place our decision upon the broader ground that in passing and acting upon the by-law in question in this case, the corporation were exceeding their powers.

Apart from the Registry Act altogether, no one would think of disputing the proposition that if a person sells lots according to a particular map or plan, the purchasers acquire an interest in the streets or lanes shown upon the plan adjoining the lots sold, which places them beyond vendor's future control to their injury.

It was admitted upon the argument that the mere registration of such a plan would not conclude the owner or confer any rights upon the public, although he might possibly—until the passing of ch. 93 of the Consolidated Statutes, subsequently varied and amended by the 24th Vic. ch. 49—have been subjected to some inconvenience by the refusal of the Registrar, after the registration of such a plan, to receive for registration a conveyance of the land, or any portion of it, described otherwise than in accordance with such sub-division. Then how would the public acquire rights by the mere sale. The purchasers could unquestionably insist upon the lane being kept open for their use, but is it not clear that by agreement among themselves they could abstain from opening it altogether or enforce its being maintained as a private way? Does it not follow that the owner might, therefore, under such circumstance by a repurchase of all the lots sold, at all events before any actual use of the lane, re-invest himself with the same rights and dominion over the property which he had before the sale.

How then is the question affected by the Registry Act? It is manifest that a registry law would be of little avail in cases where the original lot had been surveyed or subdivided into other lots in such a manner that by the new description the parcel conveyed could not be easily identified, if it were not made obligatory upon proprietors to register a plan of such new survey, and upon the Registrar to keep an index of the new survey, and to register no conveyances affecting the land so sub-divided, unless made in conformity with it; but it was not intended to alter the relative rights of vendors and purchasers, or to confer any additional right upon the public than they

would have had under a sale made in accordance with an unregistered map or plan.

The 67th section of the Surveyors Act applies to allowances for roads, streets, and commons which have been surveyed and laid out by a private proprietor, in the laying out of a town or village, and has no application to the case we are now considering.

The by-law is not one for the taking of the land of the proprietor, and for which he could claim compensation under the 373rd section of the Municipal Act, but treats the lane as vested in the public, and the parties in possession of it as trespassers, and authorizes the opening of it as a lane already in existence. It is clear that, if this by-law were to stand, the bank would not be entitled to compel an arbitration.

If it be true as alleged that the public interests require that this lane should be opened, the proprietors must submit to the law, but there is no good reason why the public should be benefited at their expense.

The course pursued by the council appears to have been a very high handed proceeding, with nothing whatever to justify it either in law or common fairness. I concur, therefore, with the learned Judge below, in holding that the by-law should be quashed; and this appeal must be dismissed, with costs.

PATTERSON, J. A.—The by-law did not assume to lay out the lane as a new road, under the powers given by the Municipal Act to expropriate lands for that purpose, and the council could not under that Act have laid out so narrow a road. It was passed on the assumption that the lane had already become a public communication, and under colour of an exercise of the power given by section 509 of the Municipal Act, R. S. O, c. 174, to pass by-laws for, *inter alia*, opening roads, streets, squares, alleys, lanes, bridges or other public communications within the jurisdiction of the council. The assumption was not founded upon any user of the lane, or other

evidence of actual dedication of it, because it had never been so used; but was founded solely upon what has been argued before us as the effect of the registration of the plan in 1856 and the sales made in accordance with it.

The opinion which I have formed respecting this contention is not influenced by the circumstance that Mr. Harris reacquired the lots he sold in the earlier years; because, if the fact of making sales according to the plan had the effect of irrevocably dedicating the lane as a highway, I suppose the recent sale to the Bank is as clearly within the letter of the statute as any of the former sales. The circumstance that all the building lots and the lane itself were sold to the one purchaser, while it would extinguish the easement if this were a private way, would not derogate from any rights given by statute to the public. The question seems therefore to be, does the the registration of the plan and the sale in accordance with it amount to a dedication of the lane as a public highway?

The argument for the defendants is based upon some provisions of the Surveyors' Acts and of the Registry Acts.

The Registry Act which was in force in 1856 was 9 Vic. ch. 34. The only enactment in that Act respecting plans was contained in section 33, which permitted any person, corporation, or company of persons, who had theretofore or should thereafter survey and subdivide any land into town or village lots, differing from the manner in which such lands were described as granted by the Crown, to lodge with the registrar of the county a plan or map; and made it lawful for the registrar to keep an index of the land described on such map or plan as a town or village, or part of a town or village, by the name by which such person, corporation, or company should designate the same. This Act was merely permissive. It permitted the person, &c., to lodge the map or plan showing the numbers and ranges of the lots and the names, sites, and boundaries of the streets or lanes by which such lots might be in whole or in part bounded; but it gave no statutory effect to the plan with regard to the lots, or to streets or lanes.

In 1865 registration of plans was made compulsory by the Registry Act, 29 Vic. ch. 24, and conveyances of lands designated upon them were required to conform to the plans, on penalty of not being registered. The draftsman of the clause, sec. 73. would seem to have had in his mind only plans of the first subdivisions of lots as originally granted by the Crown; but the language can, with some liberality of construction in matters of detail, be applied to successive subdivisions. This statute also declared that the plan should not be binding on the person filing or registering it, or upon any other person, unless a sale had been made according to it; and further made provision for making amendments or alterations of plans under a Judge's order. The same provisions were repeated in the Ontario Registry Act, 31 Vic. ch. 20, and now form secs. 82, 83, and 84, of R. S. O. ch. 111.

The only remark necessary to make respecting these statutes is, that they do not profess to deal with the subject of public highways; they deal with the registration of titles and with private rights connected with or affected by registration; and, when they assume to make registered plans binding, that effect extends only to the subdivisions as recognized in registration, and to the titles acquired by conveyances in conformity with registered plans.

Turning to the Surveyors' Acts, we find that in 1856, when this plan was filed, the Act in force was 12 Vic. c. 35. Sec. 41 of that Act recited that many towns and villages in Upper Canada had been surveyed and laid out by companies and individuals, and by different owners of the lands comprising the same, and that lands had been sold therein according to the surveys and plans thereof; and enacted that all allowances for road or roads, street or streets, common or commons, which had been surveyed in such towns and villages and laid down on the plans thereof, and upon which lots of land fronting on or adjoining such allowances for road, &c., had been sold to purchasers, should be public highways, streets and commons. It proceeded to further enact that the courses given in the survey and the

posts and monuments placed in the first survey of the towns or villages to designate the roads, &c., should be true and unalterable; and gave the right to amend or alter the first survey and plan, or any original particular division thereof, provided no lots had been sold fronting on or adjoining any street, &c., where such alteration was required to be made.

This last mentioned provision was varied by 24 Vic. c. 49, which gave any owner or owners of any town or village, or of any original division thereof, power to cause a new survey and plan thereof, altering or wholly or partially cancelling and making void the first survey and plan thereof, and the division of the land thereby into lots and allowances for roads, streets, and commons, to be performed, made, certified, deposited, and recorded in pursuance of the former Act (sec. 42 of which had made provision for depositing plans in the registry office); and declared that thereupon such first survey and plan should be altered or wholly or partially cancelled and made void accordingly: provided always, that no part of any street or streets should be altered or closed up upon which any lot of land sold in such town or village, or original division thereof, abutted, or which connected any such sold lot with, or afforded means of access therefrom to the nearest public highway: and provided also, that nothing contained in that Act should in any way interfere with the powers then possessed by municipalities in respect to highways.

Before leaving these statutes we may note three things: first, that they only related to surveys made and plans filed before the passing of the first Act, and to the original surveys of the towns or villages, or original divisions thereof, and had, therefore, no immediate effect upon Mr. Harris's plan; secondly, that their effect, so far as it pointed to a dedication of the streets, &c., as public highways, did not in any way depend upon the depositing of the plan in the registry office; but only upon the concurrence of three other circumstances, viz., the actual survey upon the ground, the laying down of the streets, &c., upon a plan, and the

sale of one or more lots abutting on the streets surveyed: thirdly, that they did not make the dedication conclusive or irrevocable, because there was the power to alter the survey and plan, saving the interests of persons who had bought lots. The case of *O'Brien v. Village of Trenton*, 6 C. P. 350; 7 C. P. 246, arose out of a dispute concerning the alleged dedication of a road by a plan that had not been filed. Draper, C. J., said (6 C. P. 353): "The fact that a street was laid out on the plan, and that one lot, at all events, was conveyed with a description bounding it on that street, may be rebutted by the ownership of the street and the lot described becoming vested in the same person, and the total absence at any time of user as a highway,"

All the provisions of sec. 41 which I have thus alluded to, and some others, now appear in R. S. O. ch. 146, ss. 67, 68, 69 and 72, without material variation beyond the extension by sec. 72, of the power of alteration to any owner of the land. The provisions of sec. 42 respecting the registration of plans, with some additional ones taken from the Registry Acts, are now consolidated in secs. 70 and 71 of R. S. O. ch. 146.

But the important feature of this legislation which makes it inapplicable in this present contest is, that it deals with the laying out of a town or village and the dedication of roads, streets, or commons to public uses in such town or village, and has no reference to the sub-division of a small town lot into a few smaller lots, or to lanes of the character of the twelve-foot alley now in question. Therefore, even if we assume that while the Surveyors' Act of 1848, (12 Vic. ch. 35, sec. 41), did not touch any survey or plan but such as were already made, yet the rule may have been so expressed in C. S. U. C. ch. 93, sec. 35, and R. S. O. ch. 146 sec. 67, as to embrace surveys and plans made in recent years, and even if we assume what is not shown, that Mr. Harris, ever had a survey actually made upon the ground, it is I think very plain that the statutes on which the defendants rely afford them no support.

It may be worth while to make two further observations concerning our statutes on the subject of these highways. One is that the statute 12 Vic. ch. 35, contained two enactments respecting the laying out of towns and villages; viz. that of sec. 41, already referred to, which dealt with the case of private surveys, and another contained in sec. 33, and now to be found in R. S. O. ch. 146, sec. 49, on the subject of public surveys. In the former, as has been pointed out, lanes are not mentioned, but only roads, streets, and commons, while the latter embraces roads, streets, *lanes* and commons as the allowances which are to be public highways and commons.

The other observation is, that the general definition of common and public highways, which originated in 1810, in 50 Geo. III. ch. 1, sec. 12, and has been repeated with slight verbal changes in all our Municipal Statutes down to R. S. O. ch. 174, sec. 486, has never included a highway established by no other acts than those relied on by the defendants in this case.

I do not think it necessary to refer at any length to the cases cited on the argument. The only one which, from some of the language employed in giving judgment, might seem at first sight to touch the questions, is, *Regina v. Boulton*, 15 U. C. R. 272. It is obvious, however, that what is called a lane in the report of that case was very different from the lane on Mr. Harris's plan; and that the existence of the plan was only a part of the evidence of dedication, which was otherwise abundantly proved.

The observations of Mr. Justice Burns, in *Regina v. Spencer*, 11 U. C. R. 31, on which Mr. *Cattunach* placed some stress, do not really touch the present question. The point he discussed was, whether a way which was at least a private way, or was conceded so to be, was not made a public highway by force of the statute 13 & 14 Vic. ch. 15, sec. 1, part of which will now be found in small print under sec. 491, of R. S. O. ch. 174, and part of which forms sec. 491, and which related to the duty of the municipality to keep highways in repair.

I shall merely add, with reference to the ground on which Mr. Justice Osler quashed this by-law, that in my judgment, the abuse by the council of its powers in the interest of an individual becomes more striking when the absence of legal justification is understood.

I agree that the appeal must be dismissed, with costs.

HAGARTY, C. J. Q. B., and MORRISON, J. A., concurred.

Appeal dismissed.

HUNTER V. VANSTONE.

New trial—Discretion of Judge—Appeal from.

Where the County Court Judge granted a new trial owing to his dissatisfaction with the verdict, the Court refused to interfere with his discretion, as it did not appear that he was clearly wrong.

Appeal from a judgment of the County Court of the county of Bruce, making a rule absolute for a new trial.

This was an action brought by the plaintiff, a Division Court bailiff, to recover the value of a certain quantity of wheat alleged to have been seized by him under an execution placed in his hands, and which wheat he contended the defendant wrongfully removed and disposed of to his own use. The case was tried before the learned Judge of the County Court and a jury, who rendered a verdict for the defendant. In the following term the plaintiff obtained a rule *nisi* for a new trial, upon the ground, among others, that the verdict was contrary to the evidence, or the weight of evidence, in this, that it was clearly shewn by the plaintiff's evidence that there was a seizure by him of the goods, and there was no evidence to shew an abandonment. The learned Judge in the Court below, after argument, made the rule absolute for a new trial, and this appeal was brought against that decision.

The case was argued on the 10th May, 1881 (a).

H. J. Scott, for the appellant.

A. Creelman, for the respondent.

July 8, 1881. MORRISON, J. A., delivered the judgment of the Court.—It is not necessary that we should enter upon a consideration of the questions argued before us. At the trial several disputed matters of fact arose, which were severally left to the jury by the learned Judge. The

(a) *Present*—SPRAGGE, C. J. O., BURTON, and MORRISON, JJ. A.

jury, in rendering their verdict for the defendant, only found on one point, viz., that they "found no seizure." With the verdict so framed the learned Judge was not satisfied, and was of opinion that there must be a new trial.

Now the first question for our determination is, whether we ought to interfere with the decision of the Court below in ordering a new trial. An application for a new trial is an application to the discretion of the Court, and the granting of a new trial must to a very large extent depend upon the opinion and discretion of the Judge, guided by the nature and the circumstances of the case with a view to the attainment of justice; and unless it appears that the Court was clearly wrong in granting a new trial we ought not to interfere.

The learned Judge being dissatisfied with the finding of the jury, we cannot say that the Court below was not warranted in making the rule absolute for a new trial, and as we see no ground for interfering with the discretion of the Court in that respect, the appeal is dismissed, with costs.

Appeal dismissed.

RE GRAND JUNCTION RAILWAY V. THE COUNTY OF PETERBOROUGH.

*R. W. Co. within Province—Power of Dominion Parliament to grant charter
—Bonus—Mandamus.*

By 18 Vic. 33, The Grand Junction R. W. Co., which was to run from the town of Peterborough to Toronto, was, with certain other companies, incorporated with the Grand Trunk R. W. Co. Not having been built within the stipulated time the charter of the former company expired, and in May, 1870, the Grand Trunk Railway having refused to construct it, an Act was passed by the Dominion Parliament, 33 Vic. ch. 53, dissociating the work from the Grand Trunk R. W. Co., and reviving the charter of the Grand Junction R. W. Co. It directed that all the corporate powers originally vested in that company should be vested in certain persons, who should exercise the same as fully as the parties named in the original charter could have done, and extended the time for construction. On the 23rd of November of the same year, the rate-payers of the defendant municipality voted in favour of granting the company a bonus of \$75,000, but the by-law was never read a third time. At the time the municipality had no power to grant a bonus to a railway company, but subsequently, in 1871, by 34 Vic. ch. 48 O. the by-law was declared as valid as if it had been read a third time. It was declared to be binding on the corporation and they were directed to act upon it and issue debentures, as if it had been proposed after the Act. On the same day the municipal law was amended so as to empower all municipalities to grant aid for similar purposes. 37 Vic. ch. 43 O. was then passed amending and consolidating the Acts relating to the plaintiff's railway, but it did not expressly give retrospective validity to anything that had been done, or mention the by-law, and by 39 Vic. ch. 71 O., the time for completion were further extended, and it was directed that none of the by-laws should lapse by reason of non-completion within the time previously fixed.

Held, reversing the judgment of the Q. B., 45 U. C. R. 302, that the Grand Junction R. W. Co., being a local work of the Province of Ontario, the Act 33 Vic. ch. 53, was *ultra vires* of the Dominion Parliament, and that the company were therefore not in existence when the defendants granted the bonus, or when the Act 34 Vic. ch. 48, validating the by-law was passed; and as 37 Vic. ch. 43 O., which was the first Act by a Legislature having power to incorporate them, did not legalize the by-law in favour of the plaintiffs, they were not entitled to a mandamus to compel the delivery of the debentures.

Held, also, that the railway being wholly within the Province of Ontario, the Dominion Parliament had no power, under the B. N. A. Act, to incorporate the company without expressly declaring the work to be one for the general advantage of Canada or of two or more of the provinces.

Per PATTERSON, J. A., the omission of the plaintiffs to file any plan in accordance with sec. 10, ss. 4 of the Railway Clauses Act, 14 & 15 Vic. ch. 51, was a sufficient answer to the application.

It was provided by the by-law that in the event of trustees being thereafter appointed by the Legislature for receiving the debentures, the Warden should, within six months after the passing of the Act, deliver the debentures to them. No special Act was passed nominating the trustees, but by the Act of 1871, 34 Vic. ch. 48, O., it was enacted that whenever any municipality should grant a bonus to the company, the

debentures might at the option of the municipality, be delivered to three trustees to be named as therein directed.

Per PATTERSON, J. A., the Legislature had not appointed trustees within the meaning of the by-law, and as there was therefore no default in delivering the debentures, the mandamus must on this ground also be refused.

This was an appeal from a judgment of the Court of Queen's Bench making absolute a rule for a mandamus upon the corporation of the county of Peterborough to issue debentures for the sum of \$75,000, and interest thereon, from the 16th December, 1870, and to deliver the same to the trustees appointed for receiving and holding of moneys or securities for money awarded by way of bonus towards the construction of the Grand Junction Railway.

The facts are set out in the report of the case in the Court below, 45 U. C. R. 302, and in the judgments on this appeal.

The case was argued on January 24th, 1881 (*a*).

Robinson, Q.C., and *H. Cameron*, Q.C., for the appellants.
Bethune, Q.C., and *Edwards*, for the respondents.

The arguments of counsel were substantially the same as those urged in the Court below.

July 8th, 1881. BURTON, J. A.—I share the reluctance of the learned Chief Justice of the Queen's Bench unnecessarily to pronounce an opinion upon the constitutionality of a statute, but I do not see how we can avoid doing so in the present case, in the view which I take of the effect of the various statutes to which our attention was directed.

The Dominion Act of 1870, was passed on the 12th May, in that year. It is entitled "An act to revive the charter of the Grand Junction Railroad Co."

The by-law of the county professing to grant the bonus in question was voted upon by the ratepayers on the 23rd November in the same year.

At that time municipalities had no general powers to

(*a*) *Present*—BURTON, PATTERSON, and MORRISON, JJ. A., and PROUD-FOOT, V.C.

assist railways by a bonus. Special charters had been granted to certain railway companies which gave the power to municipalities thus to aid the particular undertakings referred to in those charters, but there was no authority at that time to grant a bonus to the Grand Junction Railway.

The by-law was to be null and void unless the construction within the county was commenced before the 1st May, 1872, but no time was named therein for its completion.

It was unnecessary in my view to pass any Act, "for the purpose of disentangling," to use the words of the Chief Justice, the old Grand Junction Railroad Company from its connection with the Grand Trunk, inasmuch as the Act chartering the road in question had ceased to have any existence, but so far as it did profess to do so, I apprehend it would be *intra vires* of the Dominion Parliament to pass such an Act; but it is, I think, equally clear that when that Legislature assumed to revive the charter of a provincial railway, and to vest all the corporate powers rights and privileges of that resuscitated company in a new company, with a new title and a different organization, without any declaration that the undertaking thereby authorized was for the general advantage of Canada, or for the advantage of two or more of the Provinces, it exceeded its powers, and to that extent the enactment was of no legal force or vitality, and that the company so organized could not have exercised any of the compulsory powers with which Parliament professed to clothe them, but that an Act of the Provincial Legislature was necessary to confer upon such an organization corporate rights and powers.

At the time then when the voting took place the municipality had no power to grant a bonus, and there was no corporation in existence authorized to accept it or to construct the railway, and the right of the applicants to enforce a delivery of the debentures must depend on subsequent legislation.

We have no subsequent legislation by the Dominion

Parliament. All parties seem to have been satisfied that it had no jurisdiction in the matter.

We have then to consider the effect of the subsequent legislation of the local Legislature, which alone had a right to pass laws affecting it as a provincial railway, and to which alone the right of legislating in reference to municipal matters appertained.

That Legislature passed an act professing to deal with the subject on the 13th February, 1871.

The Act is entitled, "An Act to enable the municipalities along the line of the Grand Junction Railway Company to grant aid thereto, and to legalize certain by-laws granting aid to the said company;" 34 Vic. ch. 48.

Legislation like that of the Act I am now discussing is not of a character, I venture to think, calculated to raise the confidence of the public in a legislative body entrusted with the important powers of dealing with such subjects as are comprised within the words "property and civil rights."

We find, for instance, that on a petition of the railway company setting forth that Belleville and Seymour had each passed by-laws granting a bonus to the company, and the validity of such by-laws had been questioned for want of power in the municipality to grant it, and praying that those particular by-laws should be ratified, in the enacting part of the bill a few words are inserted referring to a by-law of Peterborough—nowhere before referred to either in the petition, the preamble, or in the published notices required by the standing orders of the house—and which, it is stated, was approved of by a majority of the duly qualified voters, and declaring that such by-law shall be legal, valid, and binding as if the same had received the third reading of the county council of the said county of Peterborough.

If the clause had ended here I apprehend it would have rendered but little assistance to the railway company, as the third reading would have been that of a by-law which the county had no power to pass; but, it proceeds,

'The said by-laws are hereby declared legal, valid, and binding upon the said corporations respectively, and on all others whomsoever; and the said several corporations above mentioned shall respectively proceed to issue debentures, and act upon said by-law in all respect in the same manner as if the said by-laws respectively had been proposed "after the passing of this Act."

This mode of proceeding without notice to the municipality interested, as appears by the treasurer's affidavit, strikes me as very dangerous legislation; but I apprehend that the reference to the by-law as that introduced and voted upon by the ratepayers is sufficient, and placed the by-law not only in the same position as if it had been duly passed, signed, and sealed by the council, but as if it had been proposed, adopted, and passed at a time when it was within the competence of a municipality to aid a railway corporation by a bonus. For on the same day on which this Act received the Governor's assent, an amendment to sec. 349 of the Municipal Act was also assented to whereby municipalities were empowered to grant bonuses to railways.

Still, however, there was at that time no corporation empowered to build the railway, and although therefore the by-law was declared as valid as if it had received its third reading, and had been passed since municipal corporations were authorized to grant a bonus, there was no railway company to receive it.

The fact that in the Act of 1871, the Legislature of Ontario assumed that there was a corporation in existence capable of taking the bonus and building the road does not give to the body referred to in the Dominion Statute any corporate existence, as it does not profess to do so, nor authorize them to proceed with the works; but assuming rightly or wrongly, that such a corporation competent to proceed with the undertaking did exist, it professed to legalize the by-laws in question in their favour. But the misapprehension of the Legislature as to the state of the laws on any particular subject would not, as was stated

by Cockburn, C. J., in *Earl of Shrewsbury v. Scott*, 29 L. J. C. P. 53, have the effect of making that the law which the Legislature had erroneously assumed it to be; so also in *Ex parte Lloyd*, Sim. N. S. 250, Lord Cranworth said: "the Legislature are not interpreters of the law, and Courts of law are not bound by a mistake of the Legislature as to what the existing law is."

The parties interested, as I have before remarked, seem to have become alive to this in 1874, when they procured the passage of an Act through the local Legislature professedly amending, consolidating, and reducing into one Act the Acts relating to the said company, but in reality creating for the first time since the expiry of the old charter, a corporation competent to construct the railway referred to in it.

But I do not think that this enactment assists the applicants in their demand upon the County Council. The persons who at the time of the passing of it were shareholders in the organization constituted by the Dominion Parliament were now incorporated by a Legislature which alone had power to deal with local or provincial railways under the same name as that adopted under the Dominion charter. The parties incorporated under that Act, the 37 Vic. ch. 43, O., is not the corporation referred to in the by-law, and there is nothing in that Act to validate the by-law or to make it applicable to the corporation thereby created.

The Act of 1876, 39 Vic. ch. 71, does not carry the case any further. It assumes it is true that the by-law in question is still in force, and provides that if the corporation of Peterborough request a change in the route of the railway the by-law shall remain valid notwithstanding the change, but it did not profess to validate the by-law in favour of the company.

The applicants appear to me to be on the horns of a dilemma.

If the Dominion Parliament had no power to legislate upon the matter, being a local work, there was no corpo-

ration in existence at the time the by-law passed. If, on the other hand, the Dominion Parliament had power to deal with it, the local Legislature had none. It was either a local work or a Dominion work; if the latter the Ontario Legislature had no power to deal with it, and the legislation of that body extending the time for the completion of the work, would be *ultra vires*. *Quidcunque via* the result is arrived at, it appears to me to be equally fatal to the applicants' right to succeed.

How the Act of Parliament which restricts the rate to be levied for the purpose of the by-law could be complied with does not perhaps properly arise on this application, although it is manifest that the amount now to be raised to meet the overdue payments and interest would render it necessary to strike a rate greatly in excess of the legal rate. It may be said that this is a matter against which the county might have guarded by fixing a period within which the work should be completed or the bonus forfeited.

A question possibly might arise as to the precise meaning of the latter portion of the section of the Act of 1871, when it enacts that the corporation shall proceed to act upon the by-law in all respects in the same manner as if proposed after the passing of the Act.

If it was intended thereby to supersede the provisions of the by-law as to the disposition of the debentures, the applicants must fail as to so much of their application as asks for the delivery to the trustees, as under section six, which provides for the disposition of debentures granted under by-laws proposed after the passing of this Act, the option was to be with the municipality.

If, on the contrary, it was not intended to supersede the provisions of the by-law, and that is manifestly the view taken by the applicants, I think they must equally fail as to that portion of the rule, as I am of opinion that the trustees appointed under the machinery provided under this Act of Parliament for receiving future bonuses, were not trustees appointed by the Legislature within the meaning of this by-law.

The trusts vary most materially from those contained in the by-law in permitting, or rather directing, an immediate conversion into cash, and to pay the money out on any portion of the road on the certificate of the engineer, whereas the trusts in the by-law are to deliver \$25,000 of the debentures whenever and so soon as the railway should have been completely graded from the eastern limit of the county to Peterborough, and the remainder on the iron being laid, and then only on the certificate of the engineer of the performance of the work and of certain other conditions not material now to be enquired into.

That the framers of the by-law also contemplated that the trustees should be named in the Act is, I think, manifest from their providing that the debentures shall be handed over within a certain time, not after their appointment, but after the the passing of the enactment.

But the for reasons already stated, I think the applicants have not made out a case entitling them to the mandamus. The appeal therefore should be allowed, with costs, and the rule in the Court below discharged, with costs.

PATTERSON, J. A.—In order to indicate as distinctly as may be my opinion on the various topics involved in this appeal, I shall attempt a sort of historical review of the subject, discussing the questions as they present themselves.

A company was incorporated in 1852, under the name of the Grand Junction Railroad Company, by the Act 16 Vic. ch. 43, which incorporated the whole of the Railway Clauses Act, of 1851, from the interpretation clause to the end, save in so far as expressly varied by any clause or provision in the special Act. The sixth sub-section of section twenty-two of the Railway Clauses Consolidation Act provided that if the construction of the railway should not have been commenced, and ten per cent. on the amount of the capital should not have been expended thereon, within three years after the passing of the special Act, or if the Railway should not be finished and put in operation in ten

years from the passing of such special Act, its corporate existence and powers should cease. There is no pretence that any one of these conditions was fulfilled. The corporate existence and powers of the company would therefore have ceased in 1855, if no further legislation had taken place.

There had, however, been legislation. In 1854 an Act was passed, 18 Vic. c. 33, by which, after reciting a number of other statutes, and other matters not now material to notice particularly, several companies including the Grand Junction Railroad Company, and including a company called the Grand Trunk Railway Company of Canada, which had been incorporated in 1852, by the Act 16 Vic. ch. 37, with power to construct a railway from Toronto to Montreal, were amalgamated into one company under the name of the Grand Trunk Railway Company of Canada. The union, to which full effect was given by this statute of 1854, had been arranged under the provisions of two other statutes passed in 16th Vic. viz, caps. 39 and 76, the object of which, as it is recited in cap. 39, was that the main trunk railway throughout the whole length of the province should be under the management and control of one company, or of as small a number of different companies as might be practicable. From 1854 onward the Grand Junction Company thus ceased to have any separate existence. The new Grand Trunk Company was subject to the provisions of the Railway Clauses Consolidation Act, except so far as varied by or inconsistent with the provisions contained in the Act of 1854. One of those provisions empowered the Governor in Council, from time to time, to extend the periods allowed by the several Acts of incorporation of the amalgamated railways for the completion of the works thereby respectively authorized, for such further time as he should see fit; but authorized no extension beyond the first day of January, 1860.

I do not know, from any source of information open to me on this appeal, what orders in Council may have been made; and it is not important that I should know, as the

ultimate limit of time was fixed by the statute. I have not attempted to form a decided opinion as to what would have been the effect upon the corporate existence of the Grand Trunk company, under the provisions of the Railway Clauses Consolidation Act, sec. 22, sub-s. 6, modified as they were by the special Act of 1854, of failure to complete any section of the authorized work within the time allotted to it, or within ten years from 1854. Such an inquiry would at present, and in view of the subsequent history of the Grand Trunk enterprise, and of the legislation respecting it, be a matter of curiosity only without any practical benefit. But while the existence and general constitution of the corporation may have remained unaffected by the failure, the power to construct the particular branch was manifestly lost when the limited time expired. There was, therefore, no statutory right, after the first day of January, 1860, to proceed with the construction of that part of the Grand Trunk system which the Grand Junction company had been, in its day, authorized to make. That company, I may repeat, did not owe its dissolution to the failure to do this work, because it had ceased to exist when it and the other companies became fused in 1854 into one company. Had that event not happened, it would, as I have already remarked, have expired in 1855, under the effect of the Railway Clauses Consolidation Act.

We may now pass over the remaining years before confederation, and come to the passing of the British North America Act, 1867. It is indisputable that the Grand Trunk Railway was one of the works over which the Parliament of Canada received exclusive legislative jurisdiction. Under section 92, sub-section 10, the provincial Legislature was authorized exclusively to make laws in relation to local works and undertakings other than such as were of any of three enumerated classes :

(a) Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province.

(b) Lines of steamships between the province and any British or foreign country.

(c) Such works as, although wholly situate within the province, are, before or after their execution, declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces.

I agree with the opinion expressed by Mr. Justice Cameron, in the Court below, that the assumption by the Parliament of Canada of power to legislate concerning a work wholly within one of the provinces, would not, under subsection (c) have the effect of withdrawing that work from the jurisdiction of the provincial Legislature, without an express declaration that the work was for the general advantage of Canada, or for the advantage of two or more of the provinces. But nothing of this kind was required to give jurisdiction over the Grand Trunk Railway, or any part of the undertaking authorized under that name. That part which was originally intended to be constructed by the Grand Junction Company, and which, if it had been constructed by the amalgamated company, would probably have been called the Belleville branch, or the Peterborough loop, or some such name, but which would not have been the Grand Junction Railroad, was as much the subject of Dominion jurisdiction as any other part of the Grand Trunk Railway. If the Parliament had decided to waive the forfeiture of the right to construct it, and to extend the time for the Grand Trunk company to do the work, I apprehend there could be no doubt of such action being *intra vires*.

The question of the jurisdiction to legislate, as has been done, respecting the road, is less simple. There may be difficulties connected with it, but I do not see that we can satisfactorily adjudicate upon the matter before us without grappling with them as best we may. On this account I regret that the decision in the Court below turned upon points which, in the view of that Court, made it unnecessary to consider the constitutional question, and that we are

therefore without the assistance which the consideration of the matter by that Court would have given us.

On 12th May, 1870, the Parliament of Canada passed the Act 33 Vic. ch. 53, entitled *An Act to revive the charter of the Grand Junction Railroad Company*. The preamble recited the incorporation of the company under the Act of the late Province of Canada, 16 Vic ch. 43, and stated, in terms which may substantially convey the purpose of the fusion of 1854, but which do not strike me as beyond criticism on the score of accuracy, that the Grand Junction Railroad Company became amalgamated with the Grand Trunk Railway Company of Canada, with the view of securing the construction of the said Grand Junction Railroad under the auspices of the said Grand Trunk Railway Company; and then alleges that the said Grand Trunk Railway Company having declined the construction of the said Grand Junction Railroad, are willing and consenting to the charter of the said Grand Junction Railroad being reinvested in and restored to those persons and corporations now interested in the construction of the said Grand Junction Railroad. It then proceeds to enact, in the first section, that all the corporate powers, rights, and privileges vested in the Grand Junction Railroad Company by virtue of the Act 16 Vic. ch. 43, shall be restored to and vested in a number of persons who are named, and such other persons as shall become shareholders in the said Company after the passing of that Act, and that the said corporators shall in all respects have and hold and exercise the said powers as fully as the parties originally named in the said Act 16 Vic. ch. 43, could and did hold and exercise the same; and that all powers in respect to the subscribing for and holding stock in the said company, and all other powers whatsoever by the said Act granted to Municipal Corporations and others, shall be continued by that Act, and may be exercised as fully and effectually as they might have been under the said Act; and that the name of the said company shall be the Grand Junction Railway Company. The Act made several changes from the original

one: *e. g.*, giving power to the company to build the railway with such gauge, on such line, and in such manner as the directors may think best; changing the amount of authorized capital stock from one million pounds sterling to one million dollars; depriving the company of power to build or make the railway to the city of Toronto, &c.; and it limited the time for the commencement of the railway to within two years, and the time for its completion to Peterborough to within six years, from the passing of the Act.

Had the Parliament of Canada jurisdiction to pass this Act? I was for some time inclined to the opinion that it had such jurisdiction, because the road had been part of the Grand Trunk system; but further reflection has convinced me that no tenable ground can be found, in that circumstance, for distinguishing this work from any other local work. I do not doubt that it would have been competent to the Parliament of Canada to pass an Act dissociating this line from the scheme of the main trunk line which had taken form in the establishment of the Grand Trunk company of 1854. No legislation for that purpose was necessary, because the power to construct the road had lapsed on the first of January, 1860, seven years before that Parliament came into being. If occasion for it had arisen, the jurisdiction would, I assume, have pertained to the dominion and not to the province. But when once dissociated from the trunk line, the road resumed its position as a local work. If the Act of 1854 had not been passed, but the constitution of the company under its special Act had continued, no doubt could have been thrown upon its being a matter within the exclusive jurisdiction of the province. The former status is restored by annulling in 1870 the action taken in 1854. Whether we regard the Act of 1870 as incorporating a company which before its passing did not exist, or as reviving a corporation which, either by force of the Act of union of 1854, or by force of the Railway Clauses Consolidation Act, had ceased to exist, I see no escape from the conclusion that

the work was a local work within the meaning of section 92 of the British North America Act, and not one which fell under any of the enumerated exceptions: and that therefore the Act 33 Vic. c. 53 was *ultra vires* the Parliament of Canada, or, if to any extent *intra vires*, was so only so far as it professed to dissociate the work from the Grand Trunk Railway.

The result of this view is that, when the by-law which is the immediate subject of this contest was initiated, there was no corporation authorized to construct the road called the Grand Junction Railway.

I do not assent to the proposition, advanced by Mr. Bethune for the appellants, that the Parliament of Canada has any inherent power to charter railway companies whose work is to be confined within the limits of one of the provinces, and is not declared to be for the general advantage of Canada or for the advantage of two or more of the provinces; or that any such power can be exercised as a regulation of trade and commerce. I say nothing of the right to confer corporate powers upon any trading association, so as to create a body politic capable of carrying on business in much the same way as an individual adventurer. I speak only of the power to bestow the exclusive privileges and the capacity to interfere with private rights, which are essential to the prosecution of such an undertaking as the construction and working of a railway. The limits of this jurisdiction are expressly defined by section 92, and cannot be extended by inference or implication. Neither do I perceive any reason for assigning the jurisdiction to the dominion in that provision of the special Act, 16 Vic. c. 43, which permitted the Grand Junction Railroad to run from Peterborough to the city of Toronto, "or to some point east of the said city of Toronto, to intersect the main trunk line of railway proposed to be constructed." This is only a designation of the route of the line, and it conferred no running power over, or right to meddle in any way with the works of any other company. There is nothing, in any view of it, to change the character of the road as a local work.

The by-law was intended, as stated in the title and preamble, to aid and assist the Grand Junction Railway Company and the Peterborough and Haliburton Railway Company in the construction of those railways, by giving to the former a bonus of \$75,000 and to the latter a bonus of \$25,000.

The grant of a bonus to the Grand Junction Company (assuming for argument's sake its existence in November, 1870,) does not appear to have been authorized by statute. It had become usual to insert in special Acts incorporating railway companies, passed by the Ontario Legislature, a power to municipalities to aid the undertakings by giving a bonus. The special Act of the Peterborough and Haliburton Company, 32 Vic. c. 61, passed in January, 1869, contained such a clause. But the special Act of the Grand Junction Company had not provided for giving assistance in that shape; and the general power to do so did not find its way into the municipal law until the passing of the Act 34 Vic. c. 30, on 15th February 1871.

The by-law was submitted to the electors on 23rd November, 1870, and the polling resulted in a majority of those who voted being in favour of the by-law. The affidavits before us point out various irregularities connected with the mode in which the by-law was submitted to the electors, and also show that while those who voted were a very small proportion of the whole number of persons entitled to vote, the majority for the by-law was very small; and that if those voters had been excluded who belonged to the part of the county which was shortly afterwards set off as the county of Haliburton, there would have been a decided majority against the by-law. This last circumstance is taken to indicate that the vote was really given in favour of the Haliburton bonus, and was made to tell in favour of that to the Grand Junction by the combination of the two in the one by-law, while the sense of the electors regarding the latter was unfavourable to its being granted. These objections, however well founded in fact, cannot as it appears to me, be made use of

at present further than, in conjunction with other strong circumstances, they may tend to enforce the hardship and even injustice of giving effect to the present application. There is no pretence that the by-law has any effect unless such as it has derived from the subsequent legislation, which I have yet to examine. If it is found to be the decree of the Legislature that it is to be treated as binding, that authority must be submitted to, without reference to considerations of hardship.

The first Ontario statute to which we have to refer is 34 Vic ch. 48, passed 15th February, 1871. It enacts, amongst many other things, that a certain by-law intituled "A by-law," &c., giving the title of the one in question, and which was approved of by a majority of the duly qualified voters in the County of Peterborough on the 23rd day of November, A.D. 1870, "be, and the same is hereby declared legal, valid, and binding, as if the same had received the third reading of the County Council of the said County of Peterborough; the said by-laws are hereby declared legal, valid, and binding upon the corporations respectively, and on all others whomsoever, and the said several corporations above mentioned shall respectively proceed to issue debentures, and act upon said by-laws in all respects in the same manner as if the said by-laws respectively had been proposed after the passing of this Act."

It is complained that the Council of the County of Peterborough had no notice of the intention to pass this Act, and that the reference to the Peterborough by-law is so introduced as to divert the attention of a casual reader of the Act from the fact that it is dealt with at all. I agree that if the object of the promoters of the Act had been to procure a confirmation of the defective by-law behind the backs of those on whom it imposed a burden, and without suspicion on their part that their interests were being dealt with by the Legislature, that could scarcely have been more ingeniously contrived than by the way this statute is framed. I think, however, that the by-law is

sufficiently identified by the description contained in the extract I have just made, and that we must take the Legislature to have said that, as to that by-law, two things were enacted :

1st. It was declared legal, valid, and binding, *as if it had received the third reading of the County Council.*

2. It was declared legal, valid, and binding upon the corporation, and all others whomsoever, and was directed to be proceeded upon by the issue of debentures by the corporation, and by being acted upon by the corporation in all other respects *in the same manner as if it had been proposed after the passing of that Act.*

The Act contained the then usual clause authorizing the granting of aid by municipalities to the railway; and it will be remembered that, on the day this Act was passed, the amendment of the municipal law was also passed, which empowered all municipalities to pass by-laws for similar purposes.

The effect of this legislation was thus to remove two obstacles to the legality, validity, and binding effect of the by-law, viz, the want of the third reading, and the want of power to grant the bonus.

The Act went on to make other provisions respecting the company, principally in the matter of bonuses and appointment of the trustees, to which I shall have occasion to refer further on; and it enacted that a majority of the provisional directors of the Grand Junction Railway Company might add to their number, and that such persons so added should have all the rights and powers they would have had, had they been named provisional directors in the Act incorporating the said company.

It is evident that the draftsman of this Act, and, it will be proper to say, the Legislature in passing it, treated the Dominion Act of 33 Vic. ch. 53, as having revived the corporate existence of the company. This appears from the use of the name Grand Junction *Railway* Company, and not the original name Grand Junction *Railroad* Company. The reference to the provisional directors is doubtless to

those named in the Dominion Act, and not to the gentlemen named as directors eighteen years before, not one of whose names appears in that capacity in the new Act; and the subsequent legislation confirms the view that there was no intention on the part of the Ontario Legislature, in passing this Act in 1871, to revive, as an act of legislative power, the effete corporation of 1852, and no recognition of that organization as having maintained its vitality, but merely an assumption that the Dominion Statute of the previous year had been effectual to eliminate one of the figures, by the fusion of which the Grand Trunk Railway Company had been constructed, and to give it a separate existence, with the form and aspect it had worn before its dissolution.

No theory analogous to the doctrine of waiver of a forfeiture applies to the position. It is not the case of a failure to perform certain work within a limited time, which subjects a company to forfeiture of its franchise, but which forfeiture the Legislature may waive. The original company had been legislated out of existence, and it required a substantial act of legislation to restore it to life. This was well understood by the parties interested in the road when they went to the Dominion Parliament with their petition in 1869 or 1870, and when, at a later date than I have yet reached in my survey, they procured from the Ontario Legislature the Act of 1874, which I shall presently notice. For the reasons I have given, I consider the Dominion Act inoperative, and I do not consider the Ontario Act of 1871 a declaration of the Legislature that the company still existed. I regard it as evidencing merely a mistaken supposition that a company which had, in 1854, been declared by Act of Parliament to have no longer a separate existence, had, nevertheless, continued in being, or had been revived by a legislative body whose jurisdiction did not extend to it.

I cannot adopt the reasoning of Mr. Justice Cameron in the Court below, that, "whether the Parliament of Canada had power to pass the Act 33 Vic. c. 53, or not,

there was a railway company, acting under the terms of the Act, which, if it did not create a valid corporation, contained the contract of association between the parties themselves, and so there was, at the time the by-law was read in Council, voted upon by the duly qualified voters of the county, and rendered valid and binding upon the corporation of the County of Peterborough, a company in fact to which the by-law applied, capable of accepting and using the bonus of the county for the purpose for which the same was intended"; and that "the objection, therefore, that the Grand Junction Railway Company was not, at the time the by-law became binding upon the corporation of the County of Peterborough, a valid corporation, is not entitled to prevail." One fallacy which, in my opinion, runs through this argument, is, in the idea that the Act of 1871 assumed to make the by-law binding on the corporation. I have already explained that I do not so understand it. It was a sufficiently arbitrary act of legislation to make the case an exception from the general rule by which municipal corporations are governed in the matter of passing by-laws to create onerous debts, by dispensing with the necessity for a third reading; and this had a secondary effect, unjust in its character, to which I have yet to allude. But it would have been much more unjust to have gone the length supposed by Mr. Justice Cameron's construction of the statute, and in effect passed a law that the county should pay \$75,000. All that was done, unless I mistake the effect of the statute, was to make the by-law *as valid as if* it had been read a third time, *and as if* there had been power to give a bonus.

Another fallacy, or what I regard as a fallacy, arises from attributing to a municipal corporation power to give a bonus to an unincorporated railway company. It would be careless legislation which permitted so large an expenditure of money in an enterprise over which no effective control existed, and for the prosecution of which those powers were wanting which are granted only to

incorporated companies. The special powers to give bonuses to particular companies are found only in Acts relating to incorporated companies, usually in the act of incorporation itself; and the general power given by the Municipal Act "for granting bonuses to any *railway*," as it reads in the Act of 1871, 34 Vic. ch. 30, or "to any railway company in aid of such railway," as it is in the present Act, R. S.O. ch. 174, sec. 559, sub-sec. 4, is associated with the older provision which gave power to subscribe for shares in the capital stock, or to lend to or to guarantee the payment of money borrowed by "an incorporated railway company, to which the eighteenth section of the statute 14 & 15 Vic. c. 51, or sections 75 to 78, inclusive, of chapter 66 of the Consol. Stat. of Canada, or the equivalent sections of the Railway Act of Ontario, have been or may be made applicable by any special Act." The sections referred to are essentially similar to those of the Municipal Act, omitting the lately added one respecting bonuses. The Dominion Act, on the hypothesis on which the opinion is given, serves as articles of partnership between the individuals named in it. But even that will not bear examination, for several reasons apparent on the face of the Act, amongst which is the circumstance that at least fifteen of the persons named as corporators are included merely in their official character as heads of their municipalities.

If the by-law had gone regularly through all its stages and been formally read a third time and passed, and had been duly sealed with the seal of the corporation; and if the power had, at the time it was proposed, existed to grant aid to railway companies by way of bonus; but the council had discovered before the issue of the debentures that the company seeking its aid was not duly incorporated, whether it was a simple partnership or a corporation whose franchise had been lost, and had, for that reason refused to deliver the debentures, the issue of a mandamus to compel their delivery would, in my judgment, be entirely out of the question. A ratepayer who made the discovery would have good grounds for restraining the officers from issuing them.

This was, in my opinion, the position in which matters were left after the passage of the Ontario Act of 1871.

I have already intimated that I do not attach importance, on this application, to the irregularities pointed out in the proceedings upon the by-law. They might, perhaps, if it had been read a third time and passed, have afforded ground for a motion to quash it. I do not think they could be successfully urged as reasons for holding the by-law void in any proceeding upon it. *A fortiori* the council who had read it a third time could not set up the irregularities as an answer to a charge founded upon the by-law. The statute places it in the status of a by-law read a third time. By this reading a third time, I think we should understand all the steps to be intended which are requisite to the formal completion of the by-law, even though the affixing of the seal should be one of them. I am not inclined to unnecessary liberality in construing the language of one of these *quasi* public, but essentially private Acts, in which, as has often been remarked, the language must be taken to be that of the promoters rather than of the Legislature; and with regard to which, especially when the object of the Act is to create a burden or to interfere with private rights, the construction most favourable to the public should be adopted. But, having regard to the declared object of this Act, I think it would be applying the rule with unreasonable strictness to confine the meaning of the expression, "read a third time," to the literal import of those words, if something more, of a merely formal or ministerial character, was required to perfect the by-law.

We then have a by-law which, by the effect of the statute, has been read a third time and passed. A by-law passed in the ordinary way would have been liable to be moved against for irregularities which occurred before the third reading. I doubt if any such motion against this by-law would have been entertained. Thus it may have received, in this impregnability, a higher degree of validity than an ordinary by-law; and it is possible that this

secondary effect of the legislation may have done injustice. However that may be, I do not think the irregularities could, in the present stage of the matter, help the appellants, if it were necessary for their case to rely upon them.

We have now to examine into the nature and effect of the further legislation.

The most important Act is that of 1874, 37 Vic. c. 43. O. It recites a petition of the Grand Junction Railway Company, that all the Acts relating to the company may be consolidated, amended, and reduced into one Act. The first section vests in "the shareholders of the said company" all the rights, powers, and privileges intended to be vested in the Grand Junction Railway Company under the several statutes passed by the Parliament of the late Province of Canada, by the Parliament of the Dominion of Canada, and by the Legislature of the Province of Ontario, relating to the said company. The second section repeals "the Acts passed in the sixteenth year of the reign of Her Majesty Queen Victoria, and chaptered forty-three, and the Act passed the thirty-third year of the said reign and chaptered fifty-three," but acts done under those statutes are to remain valid and binding as if the acts had not been repealed. Looking for the last named Act, 33 Vic. c. 53, among the statutes of Ontario, I find it is an Act respecting a college at Hamilton, which suggests the question whether it was intended to repeal that Act, or to repeal the *Dominion Act*, 33 Vic. c. 53, which related to the Grand Junction company. Either supposition illustrates the confused character of the legislation. It is sufficient to say of this statute that it does directly what, in my opinion, was not done by implication before, by establishing the Grand Junction Railway Company as a corporation existing under the authority of the Provincial Legislature. It evidently follows the Dominion Act of 1870, in most of its provisions, and it repeats some of those in the Ontario Act of 1871, adding others not contained in either of the former Acts. It does not attempt, so far as I can see, to give retrospective validity to anything that has

been done, merely providing for the continuance of contracts, rights, and liabilities, except in sections 16 and 17. Section 16 enacts that subscriptions for stock made before the passing of the Act, and which at the time of the passing of the Act are subsisting, shall be taken and held to be valid and binding as if duly subscribed and taken under this Act; and all persons and corporations who at the time of the passing of the Act are *bonâ fide* shareholders in the company, shall be held and taken to be shareholders of the company under this Act. And section 17 declared that all calls made and acts done under the Acts in the first section mentioned by the directors of the company, and otherwise legally made or done, are hereby declared to have been made and done by a lawfully constituted board of directors, and are hereby confirmed, &c. These sections, which show, what is also apparent from others, that a company *de facto* if not *de jure* had been in operation under the assumed sanction of the Dominion Act, certainly do not assert the original validity of the transactions which they now confirm. There is nothing in this Act which, in my judgment, cures the infirmity caused by the absence of a valid incorporation when the by-law was passed. The company, whether established anew or only revived by the operation of the Act, dates only from its passing. This is the consequence of the position I have already pointed out, the effect not being to waive a forfeiture which might, though I do not say it would necessarily, relate back so as to assume the same state of things as if no forfeiture had occurred, but to call into legal existence a company which had for years been unknown to the law. And it is a position which I take the Act itself to show was understood by its framer.

The case is, in this respect, distinguishable from such cases as *City of Toronto and Lake Huron Railway Co. v. Crookshank*, 4 U. C. R. 309, and *Smith v. Spencer*, 12 C. P. 277, to which the learned Chief Justice in the Court below refers. In the former of those cases the Act 6 Wm. IV. c. 5, had incorporated

the company, and had declared, in sec. 23, "That the said double or single railroad or way shall be commenced within three years from the date hereof, and be completed within ten years after the passing of this Act, otherwise this Act, and every matter and thing herein contained, shall be utterly null and void." The company was authorized by an Act passed nine years later, 8 Vic. c. 83, to make a planked, macadamized, or blocked road upon the same terms and under the same conditions as authorized in respect of the railroad, and the time for the completion of the work was extended to the period of four years from the passing of that Act. It was further expressly enacted that all the provisions of the first Act should apply and be in full force as regarded any plank, macadamized, or blocked road thereby authorized to be constructed, or any railroad which the company in its discretion might construct. The point decided was, that under the operation of the amending Act the company had a right to sue in debt for instalments of stock subscribed and called in under the original Act. I should have mentioned also that the new Act gave express power to sue for shares subscribed.

Smith v. Spencer was an action against a shareholder upon a judgment recovered against the Port Hope, Lindsay & Beaverton Railway Co. That company had been incorporated, under the name of the Peterborough and Port Hope Railway Co., in 1846, by 10 Vic. c. 109, which required the road to be commenced within four years and finished within twenty years, on pain of the Act becoming void, except as to such parts of the road as should be completed within the twenty years. Various Acts were passed extending the powers of the company, incorporating sections of the Railway Clauses Act, and making provisions for the management of the company. (16 Vic. c. 49; 16 Vic. c. 241; 18 Vic. c. 36). The original subscribers, who had for years supposed their subscriptions to have lapsed, and who had not acted or been treated as shareholders under the renewed organization of the company, were nevertheless held liable to the creditors. There was a good deal of hardship connected with

the circumstances which gave rise to these decisions; and the injustice to which persons are exposed by the revival by legislative enactment of effete companies, and with it the liability upon engagements made under conditions which have changed, and have been regarded as having ceased to be obligatory; but the plain effect of the statutes passed by a Legislature having jurisdiction in the premises had to be enforced by the Courts.

The Grand Junction Act of 1874, which does not strike me as open to the charge of unfairness to any class of persons, seems to aim at guarding existing rights from being affected by the repeal of former Acts and the passing of the new one, but does not assume to vary them, unless so far as that is the effect of the sections 16 and 17 to which I have alluded. The fourth section, for example, provides that "all contracts made heretofore by or with the said company, *and which are now legal and subsisting*, and all the rights and liabilities of and against the said company shall *continue* in all respects binding upon and in favor of the said company, and *shall not be altered or affected* by any provision of this Act."

I pass on from this statute, merely repeating that it leaves the validity of the by-law to be determined upon the same considerations that applied before its passing.

Then we come to the Act 39 Vic. c. 71, passed on 10th February, 1876. It extended the time for the completion of the railway to the 1st day of May, 1881. I am not sure that I understand what is "the railway" which has to be completed by that time, because the original Act gave power to make it over any or all of three specified sections; the Dominion Act assumed to restrict that power; and the Provincial Acts are silent on the subject. That is, however, a matter of no consequence at present. The second section declares that "the several by-laws passed by the several municipalities on the line of said proposed railway, *granting aid by way of bonus to the company, and which have not now lapsed*, shall stand and have the same effect as if the time in this Act fixed for the completion of said

railway had been in the Acts *now in force* respecting the said company named and fixed as the time for the completion of said company's railway, and that none of said by-laws shall lapse by reason of the said extension of time, or of the said railway not being completed within the time heretofore fixed for the completion of the same." It may be questioned whether the by-law we are discussing is one of those described in the second section, inasmuch as it was not *passed by the municipality*. I should be inclined so to hold were it not that in the sixth section it is recited that the County of Peterborough, by by-law, has granted aid by way of bonus to the said company to the extent of \$75,000. I do not take this to prove anything as a matter of fact, or to have any effect in validating the by-law; but, read with the second section, I think it serves to shew that, as a piece of description, the terms used in that section were understood by the Legislature to include this by-law. The section, however, only saves it from lapse by reason of the non-completion of the railway within the time formerly limited, whatever that was, and substitutes the time now fixed. The "Acts now in force" were only the two Provincial Acts of 1871 and 1874. The insertion, in the former of these, of the extension of time, could have had no greater effect than what attended the passing of the Act as it was, by way of restoring the company by implication arising from its recognition, for the reason, already stated at sufficient length, that there was no company to recognize.

There is a later statute concerning the company, 42 Vic. ch. 57, which deals only with matters outside of those which concern the county of Peterborough.

My conclusion from this review of the statute law is adverse to the validity of the by-law, and to the rights asserted by the company on this application. I think the mandamus should, upon this view of the matter, be refused.

But it is contended that even if the power to pass the Dominion Act were conceded, and the effect of it was to re-establish the company, there would still be grounds upon which the application must fail.

The by-law provided, in section 7, that the warden should pay and deliver the debentures to the amount of \$75,000 to the Grand Junction Railway Company, or to whomsoever should be appointed by the company to receive them, at the times and in the manner following, viz., \$25,000, when the railway should have been completely graded from the eastern limit of the county of Peterborough to the town of Peterborough; and to the remaining amount of \$50,000 whenever and so soon as the iron of the railway should have been completely laid from the eastern limit of the county of Peterborough to the town of Peterborough, and then only upon the certificate of the chief engineer of the railway of the performance of the said conditions, and upon another condition respecting the route of the railway. The mandamus is not asked to enforce this provision. It asks for the delivery of the debentures "to the trustees appointed for receiving and holding of moneys and securities for moneys awarded by way of bonus towards the construction of the Grand Junction Railway."

The sections touching the demand are as follows:—

8. That in the event of any trustee or trustees being hereafter appointed by the Legislature for the receiving and holding of moneys or securities for moneys awarded by way of bonus towards the construction of the said Grand Junction Railway, the said warden shall, within six weeks after the final passage of this by-law, or within six weeks after the passing of such legislative enactment, whichever shall last occur, hand over and deliver such debentures to the said amount of \$75,000, to such trustee or trustees, to be by them held and paid over and delivered to the said company, in accordance with and subject to the provisoes and conditions of this by-law, and not otherwise.

10. That unless the construction of the Grand Junction Railway, as to that portion thereof within the county of Peterboro', shall have been commenced on or before the 1st day of May, in the year of our Lord 1872, this by-law, in so far as the same provides for the issue of the said debentures to the said amount of \$75,000, shall become and be

null and void and of no effect, and such of the said debentures thereupon issued, if any, cancelled.

It is contended that there was no *bond fide* commencement of the construction on or before the 1st of May, 1872, as required by section 10. There is direct evidence, however, of the commencement of the work within that period, and upon this appeal we cannot say that a failure to perform the condition has been made out, so far as the actual performance of work upon the ground is concerned. It is, however objected that no plan was filed as required by sub-section 4 of the 10th section of the Railway Clauses Act, before May, 1872; and that upon the grounds much discussed in *Stratford &c., Huron R. W. Co. v. The Corporation of the County of Perth*, 38 U. C. R. 112, the company cannot be permitted to say that the execution of the railway in the county of Peterborough was proceeded with.

It is shewn by the affidavit of Mr. Edwards that the plan was not deposited in the office of the Clerk of the Peace for the county of Peterboro'. It does not appear, except by inference, whether or not it had been lodged in the office of the Secretary of the Province. The statute (14 & 15 Vic. ch. 51) required that surveys and levels should be taken and made of the lands through which the railway was to pass, together with a map or plan thereof, and of its course and direction, and of the lands intended to be passed over and taken therefor, so far as then ascertained, and also a book of reference for the railway, in which should be set forth a general description of the lands, the names of the owners and occupiers thereof, so far as they could be ascertained, and everything necessary for the right understanding of such map or plan; and that the map or plan and book of reference should be examined and certified by the person performing the duties formerly assigned to the Surveyor General or his deputies, who should deposit *copies thereof* in the office of the Clerks of the Peace in the districts or counties through which the railway should pass, and also in the office of the Secretary of the Province, and should also deliver one *copy thereof* to the company, * * and

that the said *triplicates* of the said map or plan and book of reference so certified, or a true copy thereof certified by the Secretary of the Province, or by the Clerks of the Peace, should be receivable in evidence. It then provided for the correction of errors or omissions by a certificate of Justices, to be deposited with the Clerks of the Peace; and for making a plan and section, *in triplicate*, of alterations from the original plan or survey, which was to be deposited *in the same manner as the original plan*; and *copies or extracts* of such plan and section, so far as related to the several districts or counties in or through which such alterations had been authorized to be made, were to be deposited with the Clerks of such several districts and counties. And then came sub-section 4: "Until such original map or plan and book of reference, or the plans and sections of the alterations, shall have been deposited as aforesaid, the execution of the railway, or of the part thereof affected by the alterations, as the case may be, shall not be proceeded with."

I have noted these provisions at some length, because a question arose in my mind as to what was meant in sub-section four by the "*original* map or plan and book of reference." If it meant only the one to be deposited with the Secretary, it has not been shown that such deposit was not made in due time. In fact, there is no direction, in terms, to deposit any *original*. The officer is to deposit *copies* of the documents he examines and certifies with the secretary and clerk of the peace, and to give a *copy* to the company. Then we find the copies called *triplicates*, and finally hear of the deposit of the *original*. I think the correct understanding of it is that *copies*, *triplicate*, and *original*, are used to express the same thing. There was evidently to be a *triplicate original*, but it would not have been correct to speak of depositing the *triplicate*, or even the *three copies*, because only two were to be deposited, one with the secretary and the other with the clerk of the peace; the third was for the company. The deposit of the *original* therefore, in sub-section four, means the deposit of

the two counterparts, one of which was to be with the clerk of the peace. A little doubt was in my mind suggested by the provisions that the plan and survey of an alteration was, after being made in triplicate, to be deposited in the same manner as the original plan, and a *copy or extract of it* deposited with the clerk of the peace—apparently treating the deposit of the original as not including the deposit with the clerk of the peace; but the fifth sub-section removed my doubt, by the enactment that the clerk of the peace should receive and retain the copies of the original plans and surveys, *and* copies of the plans and sections of the alterations *and* copies and extracts thereof respectively, showing that the filing of the original, as I have understood it, included the deposit with the clerk of the peace.

It is thus sufficiently made to appear that the preliminary requisite of the deposit of the plan was wanting.

I have read the judgments delivered in the *Stratford Railway Case* without seeing reason to change the opinion I there expressed, or finding any argument against it that seemed to possess much force, except that by which I understand the opinion of my brother Burton to have been influenced, namely, that the preparation and deposit of the plan was required with reference to the exercise of the compulsory power to take lands, and was therefore not an indispensable preliminary to proceeding with the work of construction. I gave my reasons for considering that that argument was not entitled to prevail, and need not now repeat them. I have perused the very able judgment delivered by our late Chief Justice, then the junior member of the Court, with renewed admiration of the liberality of thought, the force of argument, the mastery of legal principles, and the felicity of expression which it displays, and with fresh appreciation of the eminent learning and ability which fitly marked him as the successor of the distinguished Judge who then presided. I have not been able, however, to convince myself that the question whether the corporation sustained injury from the default to deposit

the plan, &c., which he allowed to form an element in the consideration of the effect of the default upon the legal power to prosecute the work, can properly enter into the discussion. But it is not impossible that, owing to a difference between that case and this, the inquiry may have been appropriate there, while it would not be so in the present case. In the *Stratford Case* the obligation to begin the work within a year was in the nature of a condition subsequent, because the debentures were, by the terms of the by-law, to be delivered to the trustees within six months after the passing of the by-law, upon the execution by the railway companies of a certain agreement; and the money was to be advanced at the rate of seventy-five per cent of the amount as the work progressed, on the certificate of the engineer, and the balance when the railways were completed. The agreement had been executed, but the delivery of the debentures was resisted, more than a year from the passing of the by-law having elapsed before they were demanded, on the ground that the work had not been begun within the year. In this case the stipulation is more like a condition precedent, because even if the trustees had received the debentures, they were to be held on the terms of the by-law; the right of the company to any part of the money could not arise until the road was not only commenced within the county, but graded as far as the town of Peterborough, and unless commenced within the limited time the right could never arise. I do not profess to appreciate the difference made by this distinction; but I think the observations of the learned Chief Justice in that branch of the *Stratford Case* show that his opinion was a good deal governed by the fact that he regarded the condition as a condition subsequent. I can at all events safely say that if my opinion in the *Stratford Case*, in which I agreed with the Court of Queen's Bench, whose judgment we were considering, was correct, it follows that the work in this case not having been commenced in time, the by-law became of no effect. I therefore hold, though I must say not without some distrust of

the soundness of my construction of the statute as regards the failure to deposit the plans, that upon this ground also the application should fail and the mandamus be refused.

There is an objection made to the liability of the corporation to the demand now made for the debentures on the ground that, conceding the validity of the by-law and the ultimate liability of the corporation, the time has not come for asserting the demand. It is said that no trustees have been appointed in the mode referred to in the eighth section of the by-law. The answer given to this is, that trustees were appointed under section 6 of the Act of 1871, and were the trustees to whom the directions in the by-law applied. Section 6 declares that whenever any municipality, or portion of a municipality, shall grant a bonus to aid the said company in the making, equipping, and completion of the said railway, the debentures therefor may, at the option of the municipality, within six months after the passing of the by-law authorizing the same, be delivered to three trustees appointed as in that section provided. And section 8 declared that the trustees should receive the debentures in trust; firstly, to convert them into money; secondly, to deposit the money, and to pay it out to the company from time to time on the certificate of the chief engineer setting out the portion of the railway to which the money to be paid out was applied, and the total amount expended on such portion to the date of the certificate. It is manifest that these trusts are not the same as those on which section 8 of the by-law declared the debentures should be held. In the Act of 1874 a similar trustee clause was inserted, differing however from that in the Act of 1871, by requiring the engineer, in place of showing the total amount expended on the portion of the line, to certify that the sum for which he certified was in pursuance of the terms and conditions of the by-law, and imposing a penalty on the engineer for wrongfully granting any such certificate. This would seem to approach more nearly to what would have been requisite to secure to the corporation the benefit of the conditions inserted in the by-law, but it is

probably open to the charge of shifting the responsibility for the observance of these conditions from the trustees to the engineer. I agree, however, with Mr. Justice Cameron, that the trustees appointed under the Act of 1871 were not appointed by the Legislature within the meaning of the by-law. It may have been unreasonable in the corporation to expect the Legislature to nominate the individuals, or to do more than to provide the machinery for their appointment; but that that is what the by-law points to is, I think, clear from the direct force of the language of section 8, and strongly confirmed by the provision for handing over the debentures within six weeks, not from the notification of the appointment of the trustees, but from the passing of the legislative enactment. I do not think the power created by section 6 of the Act of 1871 was intended to apply to this by-law. Sections 4 and 5 had made provision for municipalities, or portions of municipalities, granting bonuses, and then section 6 provided that whenever they shall do so, trustees may be appointed; plainly referring to future by-laws, and not those already existing. In the same way section 34 of the Act of 1874 applies only to grants made after that Act was passed.

On the strength of this objection, and apart from the substantial merits of the case, I think it would be our duty to allow the appeal. If this and the other objections I have discussed could have been got over, I do not think minor one on the score of laches would have been troublesome. It is not my purpose to enter into a discussion of the principles on which this objection should be dealt with; but I may say that although it may be perfectly true, as asserted by the county, that to raise the amount which would at once become necessary, if the demand of the railway company were sustained, to provide for the accumulated interest, would require an assessment exceeding two cents in the dollar, that must, for the purpose of the present branch of the argument, be taken to be the result of the neglect of the council to levy the rate from year to year. We only discuss the effect of laches in asserting a claim on

the hypothesis that there existed a claim which, if asserted without delay, would have been enforced. On this hypothesis we must assume the by-law to have been always valid or to have been effectually cured. Under its seventh section no part of the debentures or coupons could have been demanded till the grading to Peterborough had been accomplished, and two-thirds of the amount had to remain in the hands of the council till the iron was laid, neither of which events had happened when the mandamus was applied for. There is therefore ground, which is capable of being insisted on with some force, for attributing whatever prejudice may be sustained to the omission to make the completion of the work within a limited time a condition of the grant.

I am of opinion that the appeal should be allowed, with costs.

MORRISON, J. A., and PROUDFOOT, V. C., concurred, the latter desiring it to be understood that he expressed no opinion upon the powers of the Dominion Parliament to pass the Act in question.

Appeal allowed.

NOTE.—This case has been carried to the Supreme Court, and stands for argument.

HUGHES V. HUGHES ET AL.

Administration—Personal representative—Limitations, Statute of—R. S. O. ch. 49, sec. 9.

The plaintiff filed his bill against his two brothers seeking administration of his father's estate, of which he alleged they had possessed themselves on his death in 1848. It appeared that the plaintiff attained his majority in 1857, and it was not proved that any fraud or concealment had been practised upon him.

Held, that the suit was improperly constituted, as the father's personal representative was not before the Court.

Held, also, that the Court has no power, where the administration of an intestate's estate forms the subject of the suit, to appoint a representative, under sec. 9 of R. S. O. ch. 49, as the intestate is not a party interested in the matters in question in the suit within the meaning of that section.

Held, also, that the plaintiff was barred by the Statute of Limitations, and by the releases executed by him.

THIS was an appeal from the judgment of Spragge, C., dismissing the plaintiff's bill.

The bill alleged that Bernard Hughes, father of the plaintiff and defendants, died intestate in 1848, possessed of a business in ready-made clothing of the value of \$16,000, leaving his widow Anne and his sons, the plaintiff and defendants, and two daughters him surviving: that no letters of administration to his estate were procured: that his widow took possession of the business, and carried it on in her own name until 1853: that the plaintiff, at the time of his father's death, was eleven years of age: that in 1853 the widow purported to sell to the defendants her interest in the said business in consideration of \$20,000, which was paid to her from proceeds of the business within two years: that the defendants had no means of their own wherewith to purchase their mother's interest, but only the means derived from the said business owned by the defendants in common with their sisters and the plaintiff: that the sale and purchase of the mother's interest was concealed from the plaintiff: that after such purchase the defendants carried on the said business under the style of Hughes Bros., though they always pretended to the plaintiff that their mother owned it: that the plaintiff assisted in managing the business equally with defendants, and so continued till his

mother's death in 1877, being under no salary, and taking what money and clothing he required for himself and family, without any question by defendants of his right so to do: that after their mother's death the defendants ejected the plaintiff from the business, and denied his right to share therein: that he expected that under his mother's will he would get his share of the business, but on her death he ascertained that she had made no disposition of the business, or of the real estate purchased from proceeds thereof, and that the defendants claimed both as their own: that in 1879, defendant Patrick for the first time disclosed to plaintiff the deed of sale of 1853, and having taken legal advice the plaintiff then learned for the first time of the misrepresentation of the defendants as to their mother's ownership, and that in fact and in law the said business constituted the assets of his father's estate, in which he was entitled to share: that defendants had settled with their sisters in respect of their shares, and the plaintiff claimed an equal division with defendants of the business in its present extent and value: that differences arose between the defendants and plaintiff, first, in 1869; and secondly, in 1878, which on each occasion were compromised by a deed of settlement, each of which contained a clause whereby the plaintiff released the defendants from any claim which he had or might have against them: that he executed the said deeds without understanding his legal rights, without legal advice, and under compulsion; and the plaintiff asked that the same might be declared null and void to the extent of being releases affecting the rights sought to be enforced in this suit.

The bill prayed that the plaintiff might be declared entitled to a one-third share of the said business and real estate, and that the defendants might be declared trustees for the plaintiff in respect of such share.

The defendants, by their answer, besides denying the material allegations of the bill, claimed that the releases executed by the plaintiffs were a complete bar to the bill. They also relied on the Statute of Limitations and the

absence of a personal representative of the father's estate.

The case came on to be heard at the June sittings, at Toronto in 1880, before Spragge, C., who held that the plaintiff was estopped by the execution of the releases, and as the plaintiff counsel desired to take the opinion of this Court upon the Chancellor's ruling no further evidence was offered, and a decree was made dismissing the bill.

The case was argued on the 17th May, 1881 (a).

J. A. Donovan, for the appellant. The allegations made by the bill were clearly proved by the appellant's evidence, and such being the case the releases executed by him in ignorance of his rights, and owing to deceit practised upon him by the defendants, without the advice of counsel, and under compulsion, cannot be held to estop him from now asserting his just claims. No weight should be given to the fact that the father's estate is not represented, inasmuch as all the estate which he had was taken by these defendants. The authorities differ as to the necessity for a personal representative, but if necessary the Court below has power, under the 9th section of the Administration of Justice Act, to direct that an administrator be appointed. At this stage of the suit, the Statute of Limitations can have no application, as the appellant's evidence of concealed fraud on the part of the respondents was not gone into. He cited *Tate v. Williamson*, L. R., 1 Eq. 528; *Vane v. Vane*, L. R. 8 Ch. App. 383; *Rhodes v. Bate*, L. R. 1 Ch. App. 252; *Burdick v. Garrick*, L. R. 5 Ch. App. 233; *Wilson v. Thornbury*, L. R. 10 Ch. App. 239; *Flockton v. Bunning*, L. R. 8 Ch. App. 323, n.; *Gilbert v. Endean*, L. R. 9 Ch. D. 259; *Rayner v. Koehler*, L. R. 14 Eq. 262; *Coote v. Whittington*, L. R. 16 Eq. 534.

E. Blake, Q. C., (with him *Geo. Morphy*), for the respondents. An insuperable objection to the appellant is the absence of a personal representative of the estate of Bernard Hughes. Nor is this defect overcome by

(a) Present—BURTON, PATTERSON, and MORRISON, JJ.A., and OSLER, J.

section 9 of the Administration of Justice Act, upon which the appellant relies, as it is quite clear that although the Legislature may have intended to give the section a larger effect, it is confined to those cases in which the deceased was interested in the matters in question in the suit, and the cases shew that where the suit is for the administration of his estate, the intestate is not, within the meaning of the Act, a person interested "in the matters in question." The appellant is, moreover, completely barred by the Statute of Limitations, as even if the respondents obtained the assets employed in their business from the estate of the father, when he died in 1848, the plaintiff was in a position to enforce his rights in 1857, as he then became of age. Without concealment having being practised upon him by the respondents, which was not shewn, it is no answer to say he was ignorant of his rights, which, however, he failed to prove. But in addition to this defence, on which they are entitled to rely, the evidence shews that the appellant has twice for valuable considerations released whatever claims he had, and that he did so under circumstances which afford him no ground for disputing the validity and binding effect of the respective releases. We submit that it was clearly proved by the appellant's own evidence that he had no ground for bringing this suit, and that the case which he attempted to make against these respondents was without any foundation. He cited *Kerr on Frauds*, 241, 243, *et seq.*; *Walford v. Adie*, 5 Ha. 112; *Browne v. Cross*, 14 Beav. 105; *Hartwell v. Colvin*, 16 Beav. 140; *Beaden v. King*, 9 Ha. 532; *Harcourt v. White*, 28 Beav. 312; *Duke of Leeds v. Lord Amherst*, 2 Phillips 117; *Sibbering v. Earl of Balcarres*, 3 DeG. & S. 735; *Stewart's Case*, L. R. 1 Chy. App. 513; *Archbold v. Scully*, 9 H. L. C. 360; *Lyddon v. Moss*, 4 DeG. & J. 104; *Baker v. Read*, 18 Beav. 398; *Atwood v. Small*, 6 C. & F. 232, 357; *Jennings v. Broughton*, 5 DeG. M. & G. 126; *Prendergast v. Turton*, 13 L. J. Chy. 268; *Clanricarde v. Henning*, 30 Beav. 180; *Toft v. Stephenson*, 7 Ha. 15; *Penny v. Watts*, 2 Ph. 149.

July 9, 1881. BURTON, J. A.—The objection was taken by the answer and at the hearing, and is now renewed, that this suit, being in effect a suit for the general administration of the estate of the late Bernard Hughes, is defective inasmuch as there is no legal personal representative of his estate before the Court. It was urged against the objection that the intestate had no other estate than that of which the defendants possessed themselves, and that it was never necessary under such circumstances to have the legal personal representative before the Court, but that the 9th section of the Administration of Justice Act, R. S. O. ch. 49, rendered it now unnecessary to have the estate so represented.

The case of *Penny v. Watts*, 2 Ph. 149, is a strong authority to show that previous to the passing of the English Statute 15 & 16 Vict., ch. 86, the presence of the personal representative would not be dispensed with, even though it appeared upon the statements of the bill that the legacy claimed by the plaintiff was the only one remaining unpaid, and that the defendant (who was claimed to be there as here an executor *de son tort*,) had possessed himself of assets of the estate more than sufficient for the payment of the legacy.

The Lord Chancellor, in giving judgment, remarks at p. 153: "The bill states, it is true, that all the debts and other legacies have been paid, but these are allegations which can only be proved by enquiries before the Master. Even if the defendant admitted them the Court would not take his word for it. If indeed a sum had been separated from the mass of the personal estate to answer this legacy, and had got into the hands of the defendant, the Court would decree payment of it to the legatee without involving him in the general accounts of the estate;" and at p. 152: "If the estate is to be administered, the executor *de son tort* being here will not dispense with a regular representative. He is only treated as executor for the purpose of being charged, not for any other purpose."

James v. Aston, 2 Jur. N. S. 224, is a case to the same

effect and very similar in its circumstances to the present case, except that the plaintiff there was a creditor.

It is true that there are two decisions of Malins, V. C., to the contrary: *Rayner v. Koehler*, L. R. 14 Eq. 262, and *Coote v. Whittington*, L. R. 16 Eq. 534; but those cases were disapproved of by Lord Romilly and the present Master of the Rolls, and are opposed to the decision of Lord Cottenham in the case to which I have just referred, and Lord Hatherley in *Beardmore v. Gregory*, 2 H. & M. 491.

Malins, V. C., attempted to vindicate his position in a subsequent case, *In re Lovett*, reported in L. R. 3 Ch. D. 198; and he has pointed out the grounds of his judgment at p. 206, and the authorities on which he relied as bearing him out; but that learned Judge appears, if I may be allowed to say so, to have misapprehended the point of the objection, which was, that you cannot administer the personal estate of a testator or intestate in Chancery unless you have his legal personal representative before the Court. It was not disputed that there might be a suit in equity against an executor *de son tort*, and an injunction applied for, or a receiver appointed to make the property available; and the cases relied on by the learned Vice-Chancellor are cases of that description, or cases defining under what circumstances a party would be considered as filling that character.

For instance, the case of *Cottle v. Aldrich*, 4 M. & S. 175, merely decides that although a person acting under a power of attorney from one of several executors cannot be charged whilst that power is in force as an executor *de son tort*, yet if he continued to act after the death of the executor he might be so charged.

Sharland v. Mildon, 5 Ha. 469, is to a similar effect, that a person collecting moneys due to the deceased at the instance of his widow, who had not administered, and paying them over to her, was liable to be sued as executor *de son tort* by the legal personal representative.

In *Gedge v. Traill*, 1 Russ. & My. 281 n., a creditor filed a bill against the executor and certain parties who

were in partnership with the executor, and it was alleged that the partners claimed to retain certain assets of the testator which were in their hands, in satisfaction of a debt which they pretended to be due to them from the testator; and a demurrer by the partners was overruled.

The last case cited, and upon which he relied, is *Holland v. Prior*, 1 My. & R. 277. The question there was, whether the executor of an administrator who had received assets of her intestate could be made party to a suit instituted by a creditor of that estate, and at p. he cites the language of Lord Brougham in delivering judgment, in speaking of what parties were necessary in an administration suit: "The rule, he said, was to stop short at the personal representative unless where there is insolvency or where other parties stand in such relation to the deceased or his estate, or his representative, that they may be said either to have been mixed with him and his affairs during his lifetime, or to have aided his personal representative after his decease in withdrawing his estate from his creditors, or to have undertaken more directly a *quasi* representation of him."

That and the other cases are very far from sustaining the proposition that the estate can be administered in the absence of the personal representative; but the last case is authority, if authority were wanting for so clear a proposition, that in a suit against the personal representative to administer the estate, other parties who have possessed themselves of part of the estate and rendered themselves liable as executors *de son tort* may be joined as defendants.

In the case then before the Vice-Chancellor the decision was correct, the parties demurring being persons who were bound to deliver over the assets in their hands to the persons legally entitled, which relief could be obtained in one suit.

The question resolves itself therefore into whether the case is within the 9th section of the Administration of Justice Act. Our Statute appears to be founded on the English Statute, with additions intended to embrace the

cases which had been held by judicial decisions not to come within that Act.

Under the English Act it was held, very shortly after its passing, that the section had no application to a case like the present : *Silver v. Stein*, 1 Drew. 295, decided in 1852.

The Vice Chancellor intimated in that case that the section of the Act did not appear to him to be intended to apply to cases where the estate to be represented is the very estate to be administered in the suit, but only to those cases where a certain individual who, when living was interested in the suit and was made a party, has died, and then the Court may appoint some one to represent that party, or may proceed without any representative.

Groves v. Lane, 16 Jur. 1061, was a creditor's suit, in which it was alleged that there was no other estate of the intestate except that which was in the possession of some of the defendants, who had made themselves executors *de son tort*. Kindersley, V. C., held that when the estate of the deceased person formed the subject of the suit, the deceased person could not be said to be interested in the matters in question within the meaning of the section, and held that it did not apply to such a case.

The parties then applied to the Ecclesiastical Court for limited letters of administration, but the Court intimated that no case could be found in which the Court had made a decree for administering an estate in the absence of a general administrator, and with only an administrator *ad litem*.

Davis v. Chanters, 2 Ph. 544, was referred to, but distinguished. The purpose of an administrator *ad litem*, the learned Judge pointed out, was confined to cases where it was necessary that a certain person if living should be a party; and being dead, it was merely necessary to bind his estate. But to administer, you must have a full personal representative constituted.

In *Bruiton v. Birch*, 22 L. J. Ch. 911, the same Vice-Chancellor states his views of the object of the English Act thus: "The case which the Act was intended to apply

to was this: If, in administering an estate, it appeared that certain persons who were likely to have interests in the question were not all before the Court, as, for example, if one died and you could not find his representative, or if in any similar case you could not proceed without a representative, then the Court may authorize a person to appear in his stead, or may direct the suit to be prosecuted in his absence, but I do not think that it was ever intended to apply to a case where the decree is meant to be a decree against the party. That would be carrying the language beyond the intention of the Legislature;" and, at all events, it being discretionary, when asked to bind the estate of the mortgagee without his representatives being present, he would not do so.

In *Joint Stock Discount Co. v. Brown*, L. R. 8 Eq. 381, Vice-Chancellor James, who said that he remembered having had something to do with the framing of the Act, said that he understood the object of the Act to be, to get rid of the great difficulty which arose from the want of a representative of a deceased defendant, and that the Court would not allow plaintiffs to be kept at arm's length because one of the defendants has happened to die abroad, it may be in circumstances of insolvency, and who had before his death put in an answer; that in such cases the Court should have power to appoint a representative, or go on without a representative if it considered that the interests of the estate were sufficiently protected.

But the Court held that the section did not apply where the party would be required to be active in the execution of the decree which the Court might be called upon to make: *Fowler v. Bayldon*, 9 Ha. App. 78.

In *Vacey v. Vacey*, 1 L. J. N. S. 267, Wood, V.C., again states his view of the statute, viz., that where a party interested in the subject matter of the litigation died, and there was no legal personal representative, that then the Court might appoint some one to represent such interested party, but that the party in that case sought to be represented was the very settlor of the deed upon which the litigation had arisen.

Again, in *Fyfe's case*, 17 W. R. 870, Lord Romilly refused to appoint an administrator on the ground that to do so would be to make him personally liable for calls to the extent of such assets as he might get in. The Court, he says, appoints a legal personal representative under the Statute to bind the estate where the duties are nominal, but never where there is a personal responsibility attached to the position.

In *Gibson v. Wills*, 21 Beav. 620, a question arose under a marriage settlement between the children who survived their parents and those who died in their life-time. All the surviving children were parties to the cause, but no representation had been taken out to two deceased daughters, one of whom had died unmarried, the other leaving a husband. It was sought to have the husband appointed to represent the two daughters.

The Master of the Rolls refused it, remarking, "This does not appear to be a case within the Statute. It is clear there is a hostile question for discussion." If the husband be appointed, "he may make a feeble defence; and a decree obtained which will be binding on those absent. The object of the Statute was this: where you have real litigating parties before the Court, but it happens that one of the class interested is not represented, then, if the Court sees there are others present who *bona fide* represent the interest of those absent, it may allow that interest to be represented, but it will not allow the whole adverse interest to be represented."

But our own Legislature, in adopting a similar provision, has apparently sought to embrace a number of those cases to which it was held that the section of the English Act did not apply.

Our own Statute is as follows: those portions which I have italicised, being the variations from the English Act: "Where in any suit or other proceeding, it is made to appear that a deceased person, who was interested in the matters in question has no legal personal representative, the Court or a Judge may either proceed in the absence of any per-

son representing the estate of the deceased person, or may appoint some person to represent such estate for all the purposes of the suit or other proceeding, on such notice to such person or persons, if any, as the Court thinks fit, either specially or by public advertisement, *and notwithstanding that the estate in question may have a substantial interest in the matters, or there may be active duties to perform by the person so appointed, or that he may represent interests adverse to the plaintiff, or that there may be embraced in the matter an administration of the estate* whereof representation is sought; and the order so made and any orders consequent thereon shall bind the estate of such deceased person in the same manner in every respect as if there had been a duly *appointed* legal personal representative of such person, and such legal personal representative had been a party to the suit or proceeding, and had duly appeared, and had submitted his rights and interests to the protection of the Court."

Our statute goes, therefore, further than the English Act, in giving the discretion to appoint an administrator to a Judge, and in extending it to a number of those cases which by judicial decision were held not to come within that enactment, although the Judges pronouncing some of those decisions expressed very strong opinions that the particular application did not come within the words of the enactment, and that it was contrary to sound policy that the parties whose interests were affected should be so represented. I incline, however, to think that it was intended by our Act to extend the power to most of those cases in which the Courts had held in England that the statute did not apply, and to embrace such a case as the present. If such was the intention of the Legislature, it has, I think, for the reasons pointed out by the learned counsel for the respondent, failed to accomplish it. "*Quod voluit non dixit.*"

The words used in both Acts confine the exercise of the power thus to appoint a representative to those cases only in which it is made to appear that a deceased person, who

was interested in the matters in question in the suit, has no personal representative ; and the decisions to which I have referred, show that where the administration of the estate of a deceased person forms the subject of a suit, such person cannot be said to be a party interested in the matters in question in the suit within the meaning of the Act ; and that our Act equally with the English statute is confined to cases in which the deceased person was so interested ; although the section goes on to provide that the Court may then appoint a person to represent the estate, notwithstanding that he may have active duties to perform, or may represent interests adverse to the plaintiff.

Whatever may have been the intention of the Legislature, and it is not easy to place any satisfactory construction upon that portion of the enactment in its present shape, it is manifest, I think, that it cannot be invoked in aid of the plaintiff here. This would only necessitate a remission of the case back to the Court below if the parties desired it, if it were not apparent that the plaintiff cannot succeed upon the other objections taken.

Assuming it to be true that the assets employed by the defendants in their business were originally derived from the father, he died in 1848, and his widow and the defendants took possession at that time. The plaintiff attained his majority in 1857, and was then in a position to enforce his claim or to have administered to the estate.

The mere allegation that he was ignorant of his rights, even if substantiated by the evidence, would be no answer unless it could be further shewn that there was some fraudulent concealment of facts. The agreement, which he says first came to his knowledge during the administration of his mother's estate, gave no information upon this point of which he was not already aware. He did not then learn that the father's property was the foundation of the business carried on by the mother and the defendant ; and there is not a scintilla of evidence from first to last that any concealment was practised upon him by any one.

The case of *Vane v. Vane*, in L.R. 8 Ch. App. 383, to which the Counsel for the appellant referred, and in which the

plaintiff was held not barred by the lapse of seventy years, is a very different case. There the plaintiff was induced by a deception practised upon him from his earliest knowledge to believe that he was only a younger, when in point of fact he was the elder son, and was designedly by the persistent falsehood and deceit of those about him kept in ignorance of his birthright, and so prevented from claiming it, and could not by reasonable diligence have discovered it until recently before instituting the proceedings.

In the present case the appellant had all the time the same knowledge that he has or claims to have at present in reference to the business and property in respect of which he now seeks to compel an account of the defendant's dealings.

This, therefore, would in itself be an answer to any possible claim to administer his estate; and I can only express my surprise that any one could seriously urge in a Court of justice that the releases, given on two separate occasions, in as general and comprehensive terms as language can be found to express, and under the circumstances disclosed in the evidence, could be successfully impeached, the party seeking to impeach still retaining the substantial benefits which purported to be the consideration for them.

I think there is no pretence whatever for this appeal, and that it should be dismissed, with costs.

OSLER, J.—I am of opinion that the decree appealed from is perfectly right. 1. Because, for the reasons given in the judgment of my brother Burton, the suit is not properly constituted in the absence of the personal representative of Bernard Hughes, of whose estate the plaintiff seeks administration. 2. Because the plaintiff has twice, for valuable consideration which he does not even offer to relinquish, deliberately released his claims against these defendants.

PATTERSON and MORRISON, JJ.A., concurred.

Appeal dismissed.

REGINA v. BROWNE.

Extradition—Sufficiency of evidence—Depositions—Copies of—Indictment—Accessory before and after the fact.

The judgment of the Court of C. P., 31 C. P. 484, affirmed, but on different grounds.

An accessory before the fact is liable to extradition, but an accessory after the fact is not.

Upon the application to the County Judge of Kent for extradition of the defendant, who was under indictment in the State of New York for murder, the coroner, who had held the inquest there, proved by oral testimony before the County Judge here, the original depositions taken on oath before him, and also copies of the depositions certified by him to be true copies.

Held, that under section 14 of the Imperial Extradition Act of 1870, the original depositions were properly received, as the power given therein to use the original depositions is not qualified by sec. 2 of 31 Vic. ch. 94 D; and that the evidence disclosed therein was sufficient to warrant the extradition of the prisoner as an accessory before the fact.

Held, also, that the foreign indictment was not admissible as evidence against the accused.

It was shewn that the only warrant issued in this case was the warrant issued by the district attorney after the grand jury had found a true bill for murder, which did not profess to be issued upon the depositions, nor was it proved upon what evidence the bill was found.

Semble, per PATTERSON, J. A. that the right given by section 14 above referred to, to use copies of depositions is confined by the effect of sec. 2 of 31 Vic. ch. 94, to those cases in which a warrant has been issued in the United States upon the depositions.

THIS was an appeal from a judgment of the Common Pleas, discharging a rule *nisi* calling upon the Attorney-General to shew cause why a writ of *habeas corpus* should not issue to the keeper of the common gaol of the county of Kent, to have and produce forthwith in Court the body of Archibald W. Browne, a prisoner confined in the said gaol, upon an order of remand, awaiting extradition to the United States of America, upon a charge of having wilfully and feloniously, and of malice aforethought, killed and murdered one Cynthia van Allan McCrae, at the city of Buffalo, in the State of New York, in the United States of America, in the month of June, 1880, to receive and submit to such order as the Court might make and otherwise to be dealt with according to law. The case is reported in 31 C. P. 484.

The depositions shewed the following facts:—

The prisoner and the deceased both lived at Chatham, in this province, but the deceased had been absent from that

town from 27th March, 1880, when she had left home to go to Dunnville to her sister, who lived there.

On Monday, 7th June, 1880, the prisoner and the deceased went together to the Franklin house, an hotel in Buffalo, in the State of New York. The prisoner was a married man. The deceased was an unmarried woman, and was, in June, 1880, six or seven months advanced in pregnancy. At the Franklin house they passed as man and wife, by the name of Mr. and Mrs. Clarke. The prisoner entered the names Mr. and Mrs. A. W. Clarke in the hotel register. They remained at that hotel until the forenoon of Thursday, 10th June. During that time they occupied the same bed-room and had their meals served in their room.

On the 8th or 9th of June the deceased went to the rooms of Dr. Pynchon, in Buffalo, and was treated by him with electricity, besides receiving a bottle of medicine, which was fluid extract of nux vomica, and she paid him his charge, which was one dollar.

On the next day, viz., 9th or 10th June, she was again treated with electricity by Dr. Pynchon, who described the mode of treatment as being the application of one electrode of the battery over the stomach where she complained of pain, and one to the back of the neck. She paid him another dollar on that day. On the same day she gave her name to Dr. Pynchon as Mrs. Rose, and obtained from him the address of the Washington hotel, where he boarded, and she took a room there.

The prisoner and the deceased thus left the Franklin house, where they had lived together during the time when the deceased was being treated by Dr. Pynchon with electricity; the prisoner returned to Chatham, and was in his office on the 11th; and the deceased became Mrs. Rose in place of Mrs. Clarke, and removed to another hotel.

The deceased remained only one or two days at the Washington hotel. On the 11th June she asked Dr. Pynchon about a boarding-house. He told her of Mrs. Newell's house, and she removed to it on the 12th.

On the 14th June, Dr. Pyncheon, being sent for to Mrs. Newell's, found the deceased ill with congestive chill, and administered brandy, quinine, and chloroform. On the evening of that day she informed the doctor that she was pregnant. He told her the chill might produce miscarriage.

On 15th June a miscarriage took place. On 16th June the doctor telegraphed, at the dictation of the deceased he said, the words: "The courts are ready. Come at once. R." This was addressed to "C. V. Street, care of A. W. Browne, Lock Box 269." Box 269 was the post-office box of the Clerk of the County Court, in whose employment the prisoner was. A. W. Browne was the prisoner's name. It was not expressly shewn that he received this despatch, but on the morning of the 18th he called on Dr. Pyncheon, in Buffalo, and introduced himself as Mr. Rose, and asked to be taken to his wife. The doctor took him to Mrs. Newell's, where he saw him with the deceased several times during the day. In the evening he left. It did not appear from anything expressly said in the evidence how the prisoner knew of Dr. Pyncheon as the person to whom to apply. Upon this day, 18th June, the prisoner paid Dr. Pyncheon \$25 on account of his services to the deceased.

On the 23rd June, the deceased took a change for the worse. On that day the prisoner telegraphed from Chatham to Dr. Pyncheon in these words: "Wrote you yesterday. How are things looking in the Courts? Had I better come to-day or can I wait till Saturday? Answer. Clerk County Court." And the doctor telegraphed, addressed to the Clerk of the County Court at Chatham: "Courts are ready for trial. Best to come soon. R." This was received by the prisoner; and on the following day, 24th June, he was at Mrs. Newell's house, and was present in the room with the deceased, when a consultation took place between Dr. Pyncheon and Dr. Wetmore, whom Dr. Pyncheon had called in, but from whom he concealed the fact that a miscarriage had taken place. The prisoner paid Dr. Wetmore his fee, and paid Dr. Pyncheon \$15 more. The deceased died on 27th June. Her death was caused

by inflammation consequent upon the miscarriage. There was no evidence of the use of instruments or medicines, or any other means calculated to produce a miscarriage except the electricity ; but there was evidence that a miscarriage could be produced by the application of electricity.

The father of the deceased was on very intimate and friendly terms with the prisoner. He very frequently saw him during the time the deceased was in Buffalo, and met him also after intelligence of her death had been received. All this time the prisoner affected ignorance about her affairs, and made inquiries from time to time from her father, who had been allowed to believe, until he heard of her death, that she was in good health, and received replies, which to his own knowledge, showed how far her father had been deceived, without giving any hint of the deception.

The Court of Common Pleas refused the application.

The prisoner appealed.

The case was argued on the 17th June, 1881 (a).

A. Ogden for the appellant. It is contended on behalf of the prisoner that there was no legal evidence offered before the learned County Court Judge to warrant the extradition. The indictment, being found in a foreign country, is not evidence of any fact stated in it. It is merely a recital of statements made to the grand jury, as a reference to the form will shew. Mr. Justice Galt and Mr. Justice Osler, in the Court of Common Pleas, held this view in giving judgment on this case. 32 & 33 Vic. ch. 30, secs. 4, 5, D., refer only to indictments found in this country. The copies of depositions are not evidence of any fact referred to in them. They have no proper caption, are not properly proved, and do not appear to be taken in any properly organized forum, or upon a charge against any person. Moreover, the result of the investigation, if it is looked at, shews that the coroner's jury actually

(a) *Present*.—SPRAGGE, C. J. O., BURTON, PATTERSON, and MORRISON, JJ. A.

rendered a verdict which exonerated the prisoner, and how, therefore, can they be used either as evidence to extradite him, or to assist in making the indictment sufficient, as is held by Mr. Justice Galt? The jury which heard it could not say a crime had been committed. The indictment is for murder, while the depositions disclose a less serious offence, thereby disproving and contradicting it. At most, the depositions only shew an offence as an accessory after the fact, and this is no ground for extradition, not being within the offences named. The terms of secs. 1 and 2, 31 Vic. ch. 94, D., and sec. 10 of the Ashburton Treaty, are such that these depositions cannot be held as sufficient, not being properly proved, and not being the depositions on which the warrant was issued or the indictment was found. The original depositions are not before the Court, and cannot afford evidence to warrant the extradition, and even if they were here they could not be read, for the same reasons that exclude the copies. We submit, moreover, that there is no such offence disclosed as would warrant the prisoner's extradition, as it does not come within any of the statutes in force relating to extradition. The prisoner does not come within 32 & 33 Vic. ch. 30, sec. 59, as it is not pretended by the prosecutor that he took any part in the alleged crime, nor can sec. 60 apply, for it refers to misdemeanors which are not extraditable offences. If we may refer to the American law on the subject, it shews that procuring abortion, which results in the death of the child, is manslaughter, and punishable by imprisonment only: Rev. Stat. New York, vol. ii., ed. 4, pp. 847 and 876. The 1st and 2nd sections of the Extradition Act, 31 Vic. ch. 94, D., must be read together. It will then be seen the second controls and limits the first by prescribing the nature of the evidence to be acted upon. Subjects of this country have the right to demand a strict interpretation of the law affecting extradition, and the authorities shew that a case must come clearly within the law before a prisoner will be sent for trial to a foreign people, and we are entitled to ask a strict application of

the law. *Re Counhaye*, L. R. 8 Q. B. 410, is clearly distinguishable from this case. He cited *In re Williams*, 7 P. R. 275; *In re Anderson*, 11 C. P. 9, 61; *Roscoe's Crim. Evidence* 9th ed., pp. 70, 73, 682-4; *Starkie on Evidence* p. 278, 2nd ed.; *Ex parte Martin*, 4 C. L. J. N. S. 198-200; *Regina v. Robinson*, 6 C. L. J. N. S. 98, 5 P. R., 189; *In re Lewis*, 6 P. R. 236; *Clarke on Extradition*, 2nd ed., p. 185; *Regina v. Hovey*, 8 P. R. 345; *Anderson's Case*, 20 U. C. R. 124.

J. K. Kerr, Q. C., for the Attorney-General. The statutes in force respecting extradition are referred to in the report of this case in the Common Pleas. The indictment is sufficient in itself to warrant the extradition of the prisoner; but in addition to that there are the certified copies of the depositions taken before the coroner on the inquest, and verified to be such by the coroner before the County Court Judge. These comply with 31 Vic. ch. 94, D., sec. 1, and afford all the necessary evidence. The objections as to want of caption, and their not being taken on the investigation of a charge, ought, not to prevail, as they are substantially correct, and were produced and verified by the coroner who took them. We are not, however, left to these, as the original depositions were in fact produced by the coroner before the County Court Judge, and proved to be the sworn statements of the witnesses at the inquest, and under the authority of *Re Counhaye*, L. R. 8 Q. B. 410, are sufficient in themselves to secure the remand of the prisoner for extradition, and under the statute relating to extradition, 33 Vic. ch. 25, D., these are admissible. It is impossible to read the evidence disclosed in these depositions without coming to the conclusion that the prisoner is guilty. If the evidence is insufficient, we are entitled under the authorities to ask the Court not to discharge the prisoner, but to remand him until an opportunity is given to produce proper evidence for his extradition.

July 8, 1881. PATTERSON, J.A.—Leaving out of view for the present the foreign indictment, and for the present treating the foreign depositions as admissible, there is evidence of a chain of facts, of which I shall give an outline. If the depositions are not admissible, some links of the chain will be wanting. (The learned Judge here stated the facts as above.)

In making this summary, I say nothing of the weight which should be given to any part of the evidence, assuming it to be admissible, either by a magistrate or a jury. I refer merely to the fact that such is the evidence produced.

Under our law, 32 & 33 Vic. ch. 20, sec. 59, "Every woman, being with child, who with intent to procure her own miscarriage unlawfully administers to herself any poison or other noxious thing, or unlawfully uses any instrument or other means whatsoever with the like intent; and whosoever with intent to procure the miscarriage of any woman, whether she be or be not with child, unlawfully administers to her or causes to be taken by her any poison or other noxious thing, or unlawfully uses any instrument or other means whatsoever with the like intent, is guilty of felony."

It is a general rule of the criminal law that if an act be done from which death ensues, "if done in prosecution of a felonious intent, however the death ensued against or beside the intent of the party, it will be murder:" 1 *East's* P. C. 255 But even if the offence of using means to procure a miscarriage, had not been created a felony by statute, it would seem that if death resulted from their use, it would be murder by reason of the implication of malice. Thus in 1 *East's* P. C., at p. 230, after giving several examples of murder where no malice against the person killed existed, it is said, "Hither also may be referred the case of one who gave medicine to a woman; and that of another who put skewers in her womb, with a view in each case to procure an abortion; whereby the women were killed. Such acts are clearly murder; though the original intent, had it succeeded,

would not have been so, but only a great misdemeanor; for the acts were in their nature malicious and deliberate, and necessarily attended with great danger to the person on whom they were practised."

It is also our law that "Whosoever counsels, procures, or commands another person to commit any felony, whether the same be a felony at common law or by virtue of any Act passed or to be passed, is guilty of felony, and may be indicted and convicted as an accessory before the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony," &c.: 31 Vic. c. 72, s. 2, D.

If a prisoner were on his trial in this province for murder, and evidence were given of occurrences, all happening in this province, similar to those I have detailed, I do not see how it could be withdrawn from the jury as insufficient to sustain the charge. There would be ample evidence, as it appears to me, to support the inference, if the jury saw fit to draw it, that means were used with intent to procure a miscarriage: that that purpose was accomplished by the means so used; and that those means were therefore the cause of the death. There would also be abundant evidence to charge the prisoner as accessory *after* the fact, in what is told of his interviews with Dr. Pyncheon on the 18th of June, and with him and others on the 24th, when, besides what I have mentioned, some things were said in presence of the prisoner, as *e. g.*, the answer of the deceased to Dr. Wetmore's question when she was last unwell, to which she replied, "on Saturday last;" which evidence would justify the inference of the prisoner's complicity with the patient and with Dr. Pyncheon in concealing the fact of the miscarriage. The telegraphic correspondence also would have a material bearing in the same direction. But it would be proper to bear in mind that before any act was done by Dr. Pyncheon, the prisoner and deceased had come to the town together, and had stayed as man and wife at their hotel under an assumed name, which was not

the name they assumed when in communication with the doctor. That the woman's object in her visit to the town was to take means to procure a miscarriage, would be an inference indicated by the evidence; and that the man who, under the circumstances proved, accompanied her there, and was afterwards involved in the affair to the extent shown, while he was virtually denying all knowledge of her movements to her father, was acting in concert with her in the purpose and object of the expedition, while not of course demonstrated, would be a conclusion which, in my judgment, would, without doing violence to the evidence, be sustained by it. To be guilty of procuring the doctor to commit the felonious act, it is not necessary that he should have been in personal communication with him. The procurement might be through the intervention of the woman herself. See *Regina v. Cooper*, 5 C. & P. 535, and other cases collected in Arch. Crim. Pl., 17th ed., at p. 11. But it is not necessary to confine our view to Dr. Pyncheon as the principal felon; and, indeed, if his story is on this point credible, he innocently treated the woman for neuralgia, and did not know or suspect that she was pregnant, and had therefore no intent to procure her miscarriage. But he shows that she herself aided in applying the electric instrument. The intent on her part being established, she was guilty of the felony, and the accused was accessory to that crime, if he counselled or procured her to commit it. On the whole, I think the evidence would have been proper to leave to a jury. In my opinion it would satisfy the test proposed by Sir J. B. Robinson, in *Re Anderson*, 20 U. C. R. 169, namely, that if fully credited by a jury, and not repelled in any essential point, it is such that it can be truly said that the facts are strong enough, and the proof clear enough, according to the laws of this province, to sustain the charge.

If the evidence is, as I think it is, evidence on which a jury might properly convict, after discharging what is described in section 60 of *Taylor* on Evidence, as the

highly difficult duty to decide, not whether the facts proved are consistent with the prisoner's guilt, but whether they are inconsistent with any other rational conclusion, it must be equally, though I should say not *a fortiori*, evidence which would justify the apprehension and commitment for trial of the person accused. I refer to the decisions collected by Mr. S. R. Clarke in his valuable treatise on the Criminal Law, at pp. 48 & 49.

This being my view of the effect of the evidence, it is important to consider how far it is admissible.

Some essential facts are found only in depositions taken before the coroner in Buffalo, at the inquest upon the body of the deceased.

These depositions were proved by the oral testimony of the coroner, who appeared before the County Judge at Chatham, and produced the original depositions. He also proved his own authority to hold the inquest and to take the depositions.

The admissibility of these depositions depends on the construction of the Imperial Statutes 33 & 34 Vic. ch. 52, and 36 & 37 Vic. ch. 60, being the Extradition Acts, 1870 and 1873, and the Statute of Canada, 31 Vic. ch. 94. These Statutes, together with the 10th Article of the Ashburton Treaty of 1842, which is recited at length in the Canadian Statute, constitute the whole law governing the subject of extradition, as is shown by the learned Chief Justice in the Court below. The second section of the Extradition Act, 1870, provides that where an arrangement has been made with any foreign State with respect to the surrender of criminals, Her Majesty may by order in Council direct that the Act shall apply in the case of such foreign State. I do not understand this as applying to treaties existing, and given effect to by Act of Parliament when the Act was passed, which are provided for by section 27. I refer to it to only make my other references intelligible. Section 17 enacts that the Act, when applied by Order in Council, shall, unless it is otherwise provided by such order, extend to every British possession. Sub-

stituting the necessary modifications, section 18 declares that, if by any law or ordinance made before or after the passing of that Act by the Legislature of any British possession, provision is made for carrying into effect within such possession the surrender of fugitive criminals who are in or suspected of being in such British possession, Her Majesty may, by the Order in Council applying the Act in the case of the foreign State, or by any subsequent order, *inter alia*, direct that such law or ordinance, or any part thereof, shall have effect in such British possession, with or without such modifications and alterations, as if it were a part of that Act; and section 27 repeals certain Acts, and amongst others 6 & 7 Vic. ch. 76, which gave effect to the 10th Article of the Ashburton Treaty, and declares that this Act, (with the exception of any thing contained in it, which is inconsistent with the treaties referred to in the Acts repealed) shall apply (as regards crimes committed either before or after its passing), in the case of the foreign States with which those treaties are made, in the same manner as if an Order in Council referring to such treaties had been made in pursuance of the Act, and as if such order had directed that every law and ordinance which is in force in any British possession, with respect to such treaties, should have effect as part of this Act.

We thus have the Imperial Extradition Act, 1870, and the Extradition Act, 1873, which amends and is to be construed as one with the Act of 1870, in force with us; and also the Canadian Act 31 Vic. ch. 94, which has effect as part of that Act. By section 14 of the Act of 1870, "Depositions or statements on oath, taken in a foreign State, and copies of such original depositions or statements, and foreign certificates of or judicial documents stating the fact of conviction, may, if duly authenticated, be received in evidence in proceedings under this Act." Section 15 regulates the mode of authentication, providing that the documents "shall be deemed duly authenticated for the purposes of this Act, if authenticated in manner

provided for the time being by law, or authenticated as follows: * * (2). If the depositions or statements, or the copies thereof purport to be certified under the hand of a Judge, magistrate, or officer of the foreign State where the same were taken, to be the original depositions or statements, or to be true copies thereof, as the case may require; * * and if in every case the warrants, depositions, statements, copies, certificates, and judicial documents, (as the case may be) are authenticated by the oath of some witness, or by being sealed with the official seal of the Minister of Justice, or some other Minister of State; and all Courts of Justice, Justices, and Magistrates, shall take judicial notice of such official seal, and shall admit the documents so authenticated by it to be received in evidence without further proof."

There are here, it will be observed, two alternative modes of authentication authorized. *First*, the manner provided for the time being by law: *secondly*, in case of depositions, a certificate of a Judge, magistrate, or officer, *plus* the oath of a witness or seal of a minister of state. The documents before us at present are copies of the depositions certified by the coroner, and proved by his oath before the County Judge of Chatham, to be true copies of the original depositions taken on oath before him at Buffalo.

These papers seem to me to fulfil the second alternative; but I take them to be properly only memoranda of the evidence on which the County Judge acted, because he had the originals before him. Those originals were authenticated by the oath of the coroner in open Court, in the presence of the accused, who availed himself of his privilege of cross-examining the witness by his counsel. I apprehend this satisfies the first alternative, being the ordinary mode provided by law for giving evidence in open Court, when there is no statutory provision to a different effect.

The Extradition Act of 1873 does not affect this question. It merely deals with depositions and statements by including affirmations as well as oaths.

It is, however, contended that these depositions are not receivable because they are not those on which the original warrant was granted in the United States. The second section of the Canadian Act provides that in every case of complaint, (made under oath or affirmation charging any person found within the limits of Canada with having committed within the jurisdiction of the United States of America any of the crimes enumerated or provided for by the treaty), and upon a hearing upon the return of the warrant of arrest, *copies of the depositions upon which the original warrant was granted* in the United States, certified under the hand of the person or persons issuing such warrant, and attested upon the oath of the party producing them, to be true copies of the original depositions, may be received in evidence of the criminality of the person so apprehended. The argument is, that the Acts being construed as one, we have in the one Act two clauses relating to the same subject; one of which speaks of depositions generally, and the other of depositions upon which a warrant issued; each of them making the depositions evidence if proved in a certain way: that these provisions are not inconsistent, as the general expression of the one may be construed subject to the restriction contained in the other. In this case the coroner who took the depositions issued no warrant. The only United States warrant was one issued by the District Attorney after the finding by the grand jury of a true bill for murder, and was for the apprehension of the accused to answer that indictment. It does not profess to be issued upon the depositions before the grand jury, and we do not know what was the evidence on which the bill was found.

The objection at first struck me as well founded, and I am still inclined to think that if the two sections applied to the same subject matter, or so far as they do apply to the same subject matter, there may be good reason for adopting the rule of construction which is suggested. They are, however, only parallel so far as they deal with *copies*.

The section of the Canadian Act makes no express pro-

vision for the use of original depositions, and it is possible that it may not be permissible to extend the language by implication in a proceeding which touches the liberty of a person under the protection of our laws. It differs also from the Imperial Act in applying only to cases in which an "original warrant was granted in the United States." It is not essential, so far as I am aware, that a warrant to arrest the accused, which I assume to be the kind of warrant intended by our statute, should have issued in the United States before proceedings for his extradition can be taken here. If I am correct in this, it follows that our statute does not extend its rule of evidence to all cases. Possibly, it may have been deemed unsafe to permit *copies* of depositions to be used as evidence here unless, the depositions had been acted upon in the United States by the issue of a warrant upon them, and better to leave charges in cases in which there had been no warrant, to be proved in accordance with the ordinary rules of evidence. Having regard to the difference in the scope of the two sections, and without desiring to commit myself finally to the opinion that the right given by the Imperial Act to use copies is restricted by the effect of the Canadian Act to cases in which a warrant had been issued in the United States upon the depositions, I do not perceive any tenable ground for so qualifying the power given to use the original depositions.

My conclusion upon this branch of the case is, that the evidence was properly received.

The next inquiry is, whether an accessory before the fact to the crime of murder can be extradited, accessories not being mentioned in the 10th Article of the treaty. The learned Chief Justice in the Court below was of opinion that he was liable to extradition, although an accessory after the fact was not so liable. I agree with him upon both points. The Extradition Act, 1873, in section 9 declares that "Every person who is accused or convicted of having counselled, procured, commanded, aided, or abetted the commission of any extradition crime; or of being

accessory before or after the fact to any extradition crime, shall be deemed for the purposes of the principal Act, and this Act to be accused or convicted of having committed such crime, and shall be liable to be apprehended and surrendered accordingly." It will be observed that this provision is not confined to those persons who are designated in our Statute 31 Vic. ch. 72, sec. 2, which follows the Imperial Act 24 & 25 Vic. ch. 94, sec. 2, as liable to be indicted and convicted as accessories before the fact or as principal felons. Those statutes describe as the class, those who "counsel, procure, or command," the commission of the felony; a description in one respect wider, and in another narrower than the common law definition of an accessory before the fact. At common law, "an accessory before the fact is he, who, *being absent* at the time of the felony committed, doth yet procure, counsel, command, or *abet* another to commit a felony : " 1 Hale 615. The Statutes, by omitting the element of absence, would include in the description principals in the second degree; while they exclude those who merely *abet*, and do not counsel, procure, or command. And this third section of the Extradition Act, 1873, goes farther than the other statutes in embracing *aiders* and *abettors* of any extradition crime. If these additional terms added anything to the force of the words, "counsel, procure, or command," as applied to the facts of the present case, that effect must be found in the word *abet*. To *aid*, one must be present, either actually or constructively, at the commission of the crime. An *abettor* is defined in Tomlin's Law Dictionary, as "one who stirs up, instigates, or encourages, or who commands, counsels, or procures another to commit felony." The use of the terms in the statutes certainly does not weaken, but tends to strengthen the view that, under the facts in evidence, whether or not exception can be successfully taken to the technical designation of the prisoner as an accessory before the fact, he is at least brought within the letter of this section, or may be so upon a justifiable inference from the facts proved.

The section, however, goes still farther, and makes accessories *after the fact* extraditable for the principal crime. I should not like to act upon this provision. I think we should treat it as inapplicable here. The enacting part of the section is introduced by a recital that "a person who is accessory before *or after* the fact, *or* counsels, procures, commands, aids or abets the commission of any indictable offence, is by the English law liable to be tried and punished as if he were the principal offender; but doubts have arisen whether such person as well as the principal offender can be surrendered under the principal Act." It is not for me to say whether or not the English law is correctly recited. It is enough that an accessory after the fact to the crime of murder cannot, by our law, be tried and executed for murder. Reading this section, therefore, in the light of the 10th Article, which requires the evidence to be such as would, according to the laws of the Dominion, justify apprehension and commitment for trial if the crime or offence had been committed here, it is evidently, as applied to this country, inconsistent with the treaty, and therefore, by sec. 27 of the Act of 1870, is inapplicable.

The result of my opinion is, that without resorting to the foreign indictment, there is sufficient evidence to warrant and require the extradition of the prisoner.

With regard to the admissibility of the indictment as part of the evidence to be acted upon, I fully concur with the views expressed by Mr. Justice Osler in the Court below, and I do not propose to add anything to what he has so well, and, to my mind, so conclusively advanced. It may not, however, be amiss to note that while the Extradition Acts of 1870 and 1873 provide for the surrender of criminals *convicted* in a foreign country, and for the evidence of the fact of conviction, they afford no countenance to the idea that any proceeding or act of a foreign Court, short of a conviction, is a proper ground for the surrender of a person accused.

The difference of opinion in this case is somewhat

remarkable ; because, while the majority of the Court below agreed in remanding the prisoner for extradition, the learned Judges who composed the majority differed in the grounds on which their judgments proceeded ; and we affirm the judgment of the Court for reasons which none of the learned Judges deemed sufficient.

The Appeal must be dismissed.

Appeal dismissed.

REID V. HUMPHREY ET AL.

Promissory note—Material alteration.

After a promissory note, made by three persons, in these words : " We, either three of us, promise to pay D. P. or bearer," had been transferred to the plaintiff's testator, the payee's name was added to the foot of the note, apparently as maker. It did not appear how it came there, but it was not his signature.

Held, affirming the judgment of the County Court, MORRISON, J.A., dissenting, that it was such a material alteration as to vitiate the note ; and that this would have been so even if the name had been placed there by the payee or by his authority.

Held, also, that *prima facie* the name was placed there improperly ; that it would have lain upon the testator, if alive, to account for the alteration, and his death did not dispense with this requirement.

Per MORRISON, J.A.—As the name of the payee was forged, it was ineffectual to alter the character of the note, and therefore, did not vitiate it ; and in the absence of evidence to shew how the name was added, the presumption would be that, if genuine, it was placed there as an endorsement.

APPEAL from the county of Simcoe.

This was an action brought by the plaintiff, as executor of one George Smith, upon a promissory note made by the two defendants and one Lawrence Humphrey, payable to David Pickle, or bearer. The note was transferred by Pickle to the testator, and was at the time of the transfer in the same condition as when signed, so far as the parties thereto were concerned. When produced at the trial, however, the note appeared to be a note made by four parties the name " David Pickle " appearing signed thereto apparently as a joint maker with the three Humphreys. It did not appear how the name came there, but, at all events, it was not the signature of David Pickle.

The action was tried at the County Court Sittings, at Simcoe, before Judge McMahon, without a jury. The learned Judge found that after the note was issued, and while it was held by George Smith deceased it was, without the consent or knowledge of the defendants, altered in a material particular by adding the name of David Pickle, and he nonsuited the plaintiff.

From this decision the plaintiff appealed.

The case was argued on the 7th September, 1881 (a).

W. H. P. Clement, for the appellant. There is no alteration of the note. There is an entire absence of evidence showing the intention with which the name was added, and for all that appears "it was not an alteration of the note, but an addition which had no effect." Per Denman, C. J., in *Catton v. Simpson*, 8 A. & E. 136, quoted by Lush, J. in delivering the judgment of the Court in *Aldous v. Cornwell*, L. R. 3 Q. B. at p. 578. At all events there was no *material* alteration. Pickle did not in fact sign his name, so that there was no alteration of the character of the instrument, or which affected the contract of which the note was evidence: *Suffell v. The Bank of England*, L. R. 7 Q. B. D. at p. 271. Either there was an attempt to add a maker or an endorser or the intention was innocent, as, for instance, to ear-mark the note. If the first hypothesis be the proper one, there was a forgery, which the Court will not presume: *Regina v. White*, 4 F. & F. 383, *Wright v. Skinner*, 17 C. P. 317. If the second be the proper one, there was not such an alteration as would vitiate the note: *Ex parte Yates*, 2 DeG. & J. 191. We submit, however, the third is the proper hypothesis to be taken. If not received, the Court must override the presumption against the committal of a crime, as on any other hypothesis the testator must have committed a forgery.

W. G. Falconbridge, for the respondent. The name of the payee of the note appearing under the names of the makers, was either written by Pickle or it was not. If written by him it is a material alteration, and vitiates the note. If not written by him, it is none the less incumbent on him or on his representative, the plaintiff, to prove by positive testimony how the note came to be altered. Having the custody of the instrument they were bound to preserve it intact: *Davidson v. Cooper*, 11 M. & W. 778,

(a) *Present*.—SPRAGGE, C. J. O., BURTON, and PATTERSON, MORRISON, J.J.A.

affirmed in Appeal, 13 M. & W. 343. The alteration has been proved and has not been in any way accounted for, and the Court or a jury cannot be called upon to find, upon mere conjecture, how the name came there, and whether innocently or not. It makes no difference that the payee is dead. He referred to *Knight v. Clements*, 8 A. & E. 215; *Henman v. Dickinson*, 5 Bing. 183; *Byles on Bills*, 13th ed., 329; *Roscoe N. P.*, 14th ed., 362, 600; *Gardner v. Walsh*, 5 E. & B. 83.

September 17th, 1881. SPRAGGE, C.J.O.—If the name "David Pickle," added to the foot of the note, were put there by him, or by his authority, as an additional maker of the note, it would be a material alteration that would vitiate the note. This is established by the case of *Gardner v. Walsh*, 5 E. & B. 83, over-ruling the case of *Catton v. Simpson*, 8 A. & E. 136.

But upon the evidence we must take it to be established that David Pickle's name was not upon the note when it passed from his hands to the hands of Smith, the plaintiff's testator, and the *prima facie* inference is that Pickle's name was put to the foot of the note; to say the least of it, improperly.

It may be taken perhaps to be a not illogical proposition that the name David Pickle, added to the names of the real makers of the note, cannot be a material alteration, inasmuch as it effects no real change in the note: that it is only the addition of two words, which, while they import to be the name and signature of David Pickle, are not really so; and have no more effect than if they were any other two words that might be added.

But, on the other hand, the two words added purport to be the signature of a real person, placed upon this note in such wise as to make that person an additional maker of the note; and if these words were in fact what they purport to be they would constitute a material alteration of the note.

It is possible that this name was placed there innocently;

but the inference is otherwise; and it would lie upon Smith, if alive, to rebut that inference, by accounting for the name being where it is, consistently with common sense and reasonable carefulness on his part. This was held to be the law in the case of *Davidson v. Cooper*, 13 M. & W. 343, in the Exchequer Chamber, in error from the Court of Exchequer.

In that case an instrument of guaranty had been executed by two guarantors, who affixed their names to the instrument without seals. Afterwards, and while the instrument was in the hands of the person guaranteed, two seals were placed upon it, by and near to the respective signatures of the guarantors, as and for their seals, thereby causing the said guaranty to purport to be the deed of the guarantors. It was argued that there had "been nothing done which altered the character of the instrument in any legal sense. The alteration consists in putting two seals to it, but that does not alter the character of the instrument; it merely alters it in appearance. It is not pretended that there was any delivery of it as a deed; indeed, that is excluded by the facts alleged in the plea, for the defendant would have been the party to deliver it. To say that by affixing seals to it it thereby purported to be a deed is nothing, when the facts are given to shew whence the purport is derived. It was not made a deed, and therefore it was not altered in any material particular."

In the Court of Exchequer, judgment was given for the defendants, and this was affirmed by the Exchequer Chamber. Lord Denman, by whom the judgment in that Court was delivered, said, at p. 352, "After much doubt, we think the judgment right. The strictness of the rule on this subject, as laid down in *Pigot's case*, 11 Co. 27, can only be explained on the principle that a party who has the custody of an instrument made for his benefit is bound to preserve it in its original state. It is highly important for preserving the purity of legal instruments that this principle should be borne in mind, and the rule adhered to. The party who may suffer

has no right to complain, since there cannot be any alteration except through fraud or laches on his part. To say that Pigot's case has been over-ruled is a mistake; on the contrary, it has been extended: the authorities establishing, as common sense requires, that the alteration of an unsealed paper will vitiate it. Upon the doubt whether this instrument is altered, because it remains exactly as it was when signed, but only something is added near to the signatures of the defendants, we may observe, that that addition gives a different legal character to the writing, and would, if made with the consent of all interested, completely change the nature of the relation towards each other of the parties to it, and the remedies upon it. The observation that a deed is not made by sealing, but by delivery, does not appear to touch the argument, for no addition, erasure, or interlineation, after execution, makes the actual instrument different in legal effect from what it was; the original document may be perfectly visible through the attempt to disguise it, but a different appearance is produced. The truth cannot be known from inspection, but would require to be established by evidence, and this through some default of the person to whose care it was consigned, and who would be possessed of a superior legal remedy if the altered writing could be imposed on the contractor as genuine. We are therefore of opinion, both upon principle and authority, that this judgment must be affirmed."

The seals in the case last cited were no more the seals of the grantors, the defendants, than were the words David Pickle, appended to the note in question, the signature of any person bearing that name.

In my opinion the case before us is not distinguishable from the case in the Exchequer Chamber.

The fact of Smith, the testator, being dead can make no difference. The instrument, while in his possession, was altered in a material part; that alteration requires explanation; it has to be accounted for. If its failure to be accounted for be due to the death of Smith, it is the misfortune of his estate, but that circumstance cannot dispense with the requirement of the law for explanation.

BURTON and PATTERSON, JJ. A., concurred.

MORRISON, J.A.—I have the misfortune of being unable to concur in the judgment of the learned Chief Justice, for, in my opinion, the name of the payee of the note in question appearing under the names of the makers, and which was a forgery, is not a material alteration that would discharge the makers from liability. The note itself is not drawn in the ordinary way. It is: "We, either three of us, promise to pay David Pickle, or bearer." Assuming that the signature of the payee under the names of the three makers of the note was genuine, in the absence of evidence how it was placed there, the presumption, in my judgment, would be that the payee placed it there as an endorser to Smith, to whom he transferred it. Unfortunately, the latter is dead, and the plaintiff, his executor, knows nothing about it. In *re Yates*, 2 DeG. & J. 191, which was a case in some respects similar to the case before us, the name of the person added (not the payee) was placed as a maker; the objection being that the note had been altered. I assume from the judgments that there was some evidence that the name was added as an endorser, although the nature of the evidence does not appear in the report. Lord Justice Knight Bruce, in giving judgment, says: at p. "It is true that his name is written on the face of the note; but it has been for more than a century settled that this makes no difference when the intention is such as it was here. It is clear that a signature, having the effect of an endorsement, and according to a secondary sense of the term called an endorsement, may be written on the face of the note, and if written with the same intention and effect as if written on the back, will have the same effect. It would be very absurd if it had not. As this appears to me an endorsement and nothing else, the proof must, in my opinion, be admitted." Lord Justice Turner said at p. 193: "I agree, and for the same reasons. I think the intention of the parties were not to add a new maker, but to add a new person to those already liable. This might be done by

adding his name without constituting him a new maker to the note, or altering it in any way."

Here we have no evidence, except what we may gather from the note itself, which is a promise made in the words: "We, either three of us," the original makers, the name of the payee being placed afterwards under these names. Can it be properly presumed that the payee agreed to pay to himself, as maker? I think not. On the other hand, I think the presumption would be, that he placed his name there as being liable as an indorser to the deceased Smith; and as shewn by the case of *In re Yates*, 2 DeG. & J. 191, that would not be an alteration of the note. If the added name was that of a person not a party to the note and no explanation, the presumption, I think, would be, that he was added as maker; but the name added being that of the payee, the presumption would fairly be, that he was indorser. On the other hand, where the additional name of the payee was forged, as in this case, I think it is clearly inoperative and immaterial, and therefore cannot change the position or liability of the makers to the note, or prejudice them. *Aldous v. Cornwell*, L. R. 3 Q. B. 573, was a case where the payee altered the note, which expressed no time for payment, by adding the words, "on demand," before "I promise to pay;" it was held by the Court not to be material, as the law inferred it was payable on demand, and so it did not alter the contract. Lush, J., delivering the judgment of the Court (himself, Cockburn, C. J., and Blackburn, J.), after reviewing all the authorities, says at the end of the judgment: "This being the state of the authorities, we think we are not bound by the doctrine in *Pigot's Case*, or the authority cited for it; and not being bound, we are certainly not disposed to lay it down as a rule of law that the addition of words which cannot possibly prejudice any one destroys the validity of the note. It seems to us repugnant to justice and common sense to hold that the maker of a promissory note is discharged from his obligation to pay it, because the holder has put in writing

on the note what the law would have supplied if the words had not been written." Upon the same principle, it appears to me that under the circumstances of this case the forged name was, as a matter of law, inoperative, and did not change the contract in its legal effect, and therefore did not discharge the defendants from their liability.

I think the appeal should be allowed.

Appeal dismissed.

WILSON V. BROWN AND WELLS.

*Partnership—Authority of one partner to sign notes—County Court—
Amendment on appeal from.*

The plaintiff, knowing that the defendants were a firm of solicitors, advanced to one A. money upon a joint note signed by him and by one of the defendants in the firm's name, without the knowledge or consent of his partner. No usage or general mutual authority to sign notes in the name of the firm was proved, and it was admitted that the plaintiff had no knowledge of the transactions relied upon to shew such authority. A verdict was given for defendants in the County Court, and a rule *nisi* to set it aside refused.

Held, that the plaintiff could not recover against both defendants, but that the defendant who signed the note was liable; and the Court, having no power on an appeal from the County Court to amend the record, allowed the appeal on payment of costs by the appellant, so far as to direct the issue of a rule *nisi*, upon the return of which in the Court below, the necessary amendment could be made.

Semble, per BURTON, J. A., that even in the case of a trading partnership, a partner has no implied power to give the partnership name to secure the debt of a third person.

This was an appeal from a judgment of the County Court of the County of Oxford, refusing a rule *nisi* to set aside a verdict for the defendants.

Declaration on a promissory note, made jointly by the defendants and one Hall.

Pleas—1. *Non fecit*. 2. That the note was made by the defendants as sureties for Hall, and that time for payment was extended without defendants' consent.

The case was tried before McQueen, County Judge, at Woodstock, without a jury.

It appeared that the defendants were a firm of solicitors, and that the defendant Brown signed the firm name to the note sued on as sureties for Hall, who was a joint maker, without the knowledge of his partner and co-defendant Wells. The only business, outside of their business as solicitors, with which they were connected, was a contract on the Welland Canal, but there was nothing to prove that they required negotiable instruments to carry it on. It was not shewn that on any previous transaction one partner had signed the partnership name without the authority

of the other, and that he had ratified it; and although evidence was given to prove that the defendants had previously given the endorsement of the firm to two banks, with whom they had agreed in writing that they would be mutually responsible for paper on which the firm name appeared, there was nothing to show that these endorsements were not endorsements of paper held by the firm, and the plaintiff was entirely ignorant of these previous transactions.

When the note matured Hall paid the plaintiff the interest due, and requested him to let the note run on another year, which he agreed to do, and when the next year came round Hall paid him the year's interest, and made a similar request, which was granted.

The case was argued on the 9th September, 1881 (a).

McCarthy, Q. C., for the appellant. Our right to recover against the defendants on the note sued on was established the moment we proved, as we did, the usage or course of dealing of the respondents to sign the firm name in transactions outside of their business as solicitors: *Workman v. McKinstry*, 21 U. C. R. 623; *Henderson v. Carveth*, 16 U. C. R. 324. No extension of time was given to Hall; it was at most mere forbearance. At all events the appellant is entitled to a verdict against the defendant Brown, whose signature to the note is not disputed. If the declaration as framed is not sufficient, we ask that this Court should now make the necessary amendment by striking out the name of Wells. [PATTERSON, J. A.—On an appeal from the County Court this Court has no power to amend the record.] We submit that the amendment can be made: *Lake Superior Navigation Company v. Beatty*, 34 U. C. R. 201.

Bethune, Q. C., for the respondents.—The amendment asked should not be granted at this stage of the suit. If such an application had been made at the trial the

Present.—SPRAGGE, C. J. O., BURTON, PATTERSON, and MORRISON, J. J. A.

defendant Wells might not have resisted the suit. It is clear, however, that the Act relating to appeals from the County Court gives this Court no authority to amend the record. The agreement to extend the time for payment of the note was sufficient to release respondents, who were merely sureties for Hall: *Fowler v. Cook*, L. R. 7 H. L. 27. It must be held on the evidence that the appellant has failed to prove any general authority or usage to sign the firm name to promissory notes except in connection with their business as solicitors: *Fraser v. McLeod*, 8 Gr. 268; *Smith v. Coleman*, 7 Jur. 1053.

McCarthy, Q. C., in reply. There was no binding agreement to extend the time for payment, as there was no consideration for it. It is admitted that the respondents varied their partnership articles on several occasions, and the limit, if any, to the usage not being known to the appellant he is entitled to recover.

September 17, 1881. BURTON, J. A.—This, which was an action against a firm of solicitors, upon what purported to be their joint promissory note, was tried by the County Court Judge of Oxford, without a jury, and resulted in a verdict for the defendants. A rule to set aside that verdict, and enter it for the plaintiff, or for a new trial, was moved for and refused, and this appeal is against that decision.

The plaintiff at the trial put in the examination of the defendant Brown, and closed his case.

At that stage of the proceedings it was clear that the defendants were entitled to a nonsuit, which was moved for; but the defendants' counsel preferred to call witnesses for the defence, mainly with the view, apparently, of establishing that time had been given to another joint maker, Hall, for whom these defendants were sureties, and that they were therefore discharged.

That defence fails. All that appears upon the evidence is, that at the maturity of the note and on two subsequent occasions the accrued interest was paid, and on each of

these occasions an agreement to extend for a further period of a year was made. But such agreement was a *nudum pactum*. There was no consideration for it, the interest not being paid in consideration of the extension, but for the period during which it had been earned. But it is said on the part of the plaintiff that the evidence given by the defendants entitled him to recover, either on the ground that it appeared that the defendants carried on business other than that of solicitors, in a manner to render them liable upon a note issued by one of them in the firm name, as in the case of an ordinary trading partnership, or that there was evidence to show a general mutual authority to sign notes in the name of the firm.

Upon the first of these the evidence—if there is anything which can be called evidence—is of a very meagre description. The only specific instances of business outside of their usual business of solicitors admitted by the witness Wells was, that they had a contract on the Welland Canal, but whether it was a contract requiring the use of negotiable paper in its execution is not shown, and it can scarcely be inferred from the mere circumstance of these defendants having a contract that they were carrying on an ordinary trading or commercial business, and that, therefore, each had an implied power to bind his partners by a bill or note. But even assuming that it afforded some evidence fit to submit to a jury, we cannot say that the inference drawn by the Judge sitting as a jury is necessarily erroneous.

The other question—viz., the right to recover on the ground of usage or on mutual authority to sign the name—depends on different considerations. It is not shewn that either of the partners has paid or recognized a note given by his co-partner without his authority; all that is shewn is that in the case of two banks they have each given endorsements of the firm with the knowledge of the other, and a writing to the banks that each would hold himself responsible to the banks upon paper so signed, but it is not shown that these endorsements were not endorsements

of paper held by the firm. It is not proved that in a single instance one partner signed the partnership name without the authority of the other, and that the other subsequently ratified the transaction. Moreover, it is shown that the plaintiff had no knowledge of these previous transactions, and as in the case of a party holding himself out as a partner the language of Baron Parke equally applies to a case like the present: "If" he says, "it could have been proved that the defendant had held himself out to be a partner—not *'to the world*, for that is a loose expression, but to the plaintiff himself, or under such circumstances of publicity as to satisfy a jury that the plaintiff knew of it and believed him to be a partner, he would be liable to the plaintiff in all transactions in which he engaged and gave credit to defendant upon the faith of his being such partner.

In the present case no inference unfavourable to the defendant Wells can be drawn from the previous dealings, because the plaintiff admits that he never heard of them, and he cannot therefore have been in any way misled.

It comes therefore to this, that the plaintiff, having no knowledge of the previous dealings and knowing that the defendants were a firm of solicitors, lent a sum of money to Hall upon a representation that he would get the defendants to join him in a note to secure it, and that he obtained such a note signed by one of the firm, without the knowledge or consent of his partner. It is not shown that such was a usual course of dealing, or that it had occurred on any previous occasion.

It would seem to me that even in the case of a trading partnership, such a transaction as the present could not be upheld. The implied power of a partner does not extend to giving the partnership name to secure the debt of a third person; and without distinct evidence that there was an assent, authority, or recognition of such a making by the other member, he should not be bound.

The learned Judge has not given the reasons for his decision, but I think that upon this ground alone it may be supported.

But while the plaintiff thus fails to recover against the defendants jointly, there is no reason why Brown, who actually made the note, should not be held liable to pay it. There is only the technical objection to the recovery against him alone on this record. This might be cured by an amendment, striking out the name of Wells, on terms which would be just to him in respect of his costs. As the law now stands we do not consider that we have jurisdiction to make such an amendment on an appeal from a County Court. We can, however, as the appeal is from the refusal to grant a rule *nisi* in the Court below, allow the appeal so far as to direct the granting of the rule *nisi*; and upon its return the learned Judge can make the amendment, if prayed to do so.

We direct the issue of the rule *nisi*, and for the purpose remit the case to the Court below, the appellant to pay the costs of this appeal.

SPRAGGE, C.J.O., PATTERSON, and MORRISON, JJ.A., concurred.

GAUGHAN V. SHARPE, ET AL.

Prayer for general relief—Effect of—Relief not specifically prayed for.

If the allegations in a bill state a case entitling a party to relief, he may under the general prayer have it, though his specific prayer may have been for other relief; but a plaintiff cannot take advantage of the ambiguity of his own pleading so as to claim upon facts stated in the bill *alio intuitu*, a relief entirely foreign to the scope of the bill.

The bill, which was filed against the executors of C. S., his widow and children, prayed that the proceeds of an insurance policy which had been effected by the deceased for his wife and children should be subjected in the hands of the executors, to the payment of moneys lent by the plaintiff to the deceased, and applied by him to the support of his children, and that the executors might be restrained from paying over the money.

BLAKE, V. C., overruled a demurrer thereto, and under the prayer for general relief granted administration.

Held, reversing this decision, that under the circumstances the plaintiff was not entitled to the administration decree.

THIS was an appeal from an order of Blake, V. C., overruling a demurrer for want of equity, a demurrer *ore tenus* for multifariousness, and a partial demurrer *ore tenus* for want of equity as to so much of the bill as claimed relief in respect of the insurance money in question.

The bill was filed by a creditor of Charles Sharpe, deceased, against his executors, widow and children. It alleged that sometime in 1879 the deceased defendant borrowed from the plaintiff \$472, for which he gave him his promissory notes endorsed by one Oliver by way of security: that the deceased represented at the time of such loan that he required the said sum to pay for the maintenance and education of his children, the infant defendants, and that the money so borrowed was applied towards that purpose: that the plaintiff had recovered judgment against the deceased and Oliver for the sum of \$384, the balance remaining due on the said notes: that neither Oliver or the deceased had any means out of which it could be satisfied, and that it still remained wholly due and unsatisfied: that prior to the death of his first wife, the mother of the infant defendants, the deceased had insured his life in favour of her and her children: that he made a will whereby he devised all his real and personal

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We direct the issue of the rule *nisi*, and for the purpose remit the case to the Court below, the appellant to pay the costs of this appeal.

SPRAGGE, C.J.O., PATTERSON, and MORRISON, J.J.A., concurred.

GAUGHAN V. SHARPE ET AL.

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estate to his present wife, the defendant Hannah Sharpe and that the said insurance money was paid over by the Insurance Company to the executors, who held the same in trust. The bill prayed that the plaintiff might be paid the amount of the judgment out of the insurance money, and until payment thereof that the executors might be restrained from otherwise dealing with the fund. The demurrer was on behalf of the executors and widow.

The case was argued on the 27th May, 1881 (*a*).

J. H. Macdonald, for the appellant It was admitted in the Court below that the plaintiff was not entitled to relief in respect of the insurance money, but the learned Judge held that as it was alleged that the testator made a will whereby he devised and bequeathed his real and personal estate, this was a sufficient allegation on which to found a decree for administration of such assets. We submit, however, that on the bill as framed the plaintiff was not entitled to an administration. There is no allegation that the executors ever acted, or that they accepted probate: *Kelly v. Ardell*, 11 Gr. 579 Administration of real estate will not be granted unless the bill is on behalf of all the creditors: *Ponsford v. Hartley*, 2 J. & H. 736. It appears by the bill that the insurance money was not an asset of deceased. It sufficiently appears by the bill that that the insurance was effected under the Act: *Fraser v. Phoenix Mutual Ins. Co.*, 36 U. C. Q. 422. The frame and tenor of the bill clearly shew that the plaintiff only intended to resort to the insurance money, and did not claim the right to resort to any other fund, and he should be confined to the case indicated by his bill. To grant administration on the bill as framed would be a surprise to the defendants: *Stevens v. Guppy*, 3 Russ. 171: *Feraby v. Hobson*, 2 Phil. 255; *Chapman v. Chapman*, 13 Beav. 308; *Hiern v. Mill*, 13 Ves. 119; *Cockerell v. Dickens*, 3 Moo. 135; *Wilkinson v. Beal*, 4 Mad. 408. It having

(a) Present—SPRAGGE, C.J.O., BURTON, PATTERSON, and MORRISON, JJ.A.

been admitted that the plaintiff was not entitled to relief in respect of the insurance money, the learned Judge should have allowed the partial demurrer as to it. If on the bill as framed it can be taken that the plaintiff asks for a decree for administration of the estate of Charles Sharpe, and also for a decree as against the insurance moneys in the hands of the executors, as trustees for the children, the bill is multifarious; the executors are brought before the Court in different rights, in respect of different interests, and different persons would be interested. He referred to *Lewis's Equity Pleading*, 159, 162, 163; *Daniel*, 5th ed., 314; *West Gwillimbury v. Simcoe*, 21 Gr. 68; *Phillips v. Royal Niagara Ins. Co.*, 25 Gr. 362; *Graham v. Chalmers*, 9 Gr. 242; *Grant v. Eddy*, 21 Gr. 576; *Halford v. Kymer*, 10 P. & C. 724; R. S. O. ch. 129, secs. 7, 8, 16.

E. Blake, Q. C., for respondents. It appears by the bill that the insurance moneys are assets of the testator in the hands of his executors. It does not state when the insurance was effected, whether before or after the passing of the Act; nor it is not alleged that it was effected under the Act, and it cannot be assumed that it was an insurance under the Act, and therefore protected from the creditors of the testator. Inasmuch, therefore, as it appears from the bill that there are assets in the hands of the executors available for the payment of the debts of the testator, the plaintiff is entitled to payment out of such assets, and therefore to an administration decree.

The defendants, Alfred Sharpe and Charles Reading, are brought before the Court as executors of Charles Sharpe, and as trustees of his children. So far as the insurance money is concerned, the two capacities are not inconsistent. The bill alleges that Charles Sharpe devised all his real and personal estate, including the insurance money, to the defendant Hannah Sharpe and his children, the infant defendants, and that the insurance money was paid to his executors. If it should be held that the plaintiff can resort to the insurance money, then the executors being the trus-

tees of that fund, under the will of the deceased, are properly before the Court. If it should be held that the plaintiff cannot have recourse to the insurance money, but must look to the general estate of the deceased, the executors are also properly before the Court as the persons chargeable with administration of the estate under the will; and whether the plaintiff gets relief from the insurance money or from the general estate of the deceased, the executors are proper and necessary parties to the suit, and it is competent for the plaintiff to charge them with payment, whether out of the insurance money or out of the general estate of the deceased, both funds being vested in the same persons.

Sept. 17, 1881. SPRAGGE, C. J. O.—The plaintiff files his bill as a creditor of the late Charles Sharpe. He recovered judgment against Charles Sharpe and one Robert Oliver, for the balance of two notes given by Sharpe, and endorsed by Oliver, in favour of the plaintiff; and he alleges that Oliver has had no means since the recovery of the judgment out of which the same could be realized, and that the same could not be realized under execution against Charles Sharpe.

The bill is filed against the executors of the will of Charles Sharpe, and against his widow, Hannah Sharpe, and his children, who are infants; and proceeds upon what the plaintiff assumes to be an equity, arising upon the circumstances stated in the bill, entitling him to be paid so much of the amount which has been paid by a certain life insurance company to the executors of Charles Sharpe, in respect of an insurance effected by Charles Sharpe, for \$2,500, in favour of his then wife and children, as may be necessary to satisfy the plaintiff's judgment. The bill alleges that the executors now hold the money so paid to them, in trust.

The specific relief prayed for by the plaintiff is, that he may be paid his judgment, interest, and costs, out of the insurance money in the hands of the executors, and for an injunction restraining them from otherwise dealing with the

fund ; and there is the usual prayer for general relief. The bill was demurred to for want of equity by the executors of Charles Sharpe, and by his widow.

The learned Judge before whom the cause was heard was of opinion that the circumstances as stated in the bill as constituting an equity, entitling the plaintiff to be paid out of the insurance moneys come to the hands of the executors, did not constitute such equity, and in that opinion we agree ; but he held that upon the allegations in the bill, the plaintiff was entitled to an order for administration, and therefore over-ruled the demurrer generally. At the hearing of the demurrer, the plaintiff demurred *ore tenus* for multifariousness, and that also was over-ruled.

The bill is framed upon the peculiar equity which the plaintiff put forward as entitling him to a charge upon the insurance money. I do not see that any one allegation in the bill can be pointed at, as introduced for any other purpose ; and the specific prayer points solely to that purpose.

In proof that the bill is not at all framed for the obtaining of the relief which has been granted, *i.e.*, a decree for administration, I may point to the fourth paragraph, which states the absence of means in Oliver to pay the debt, and that it could not be realized under execution against Charles Sharpe, indicating the insurance money as the only fund. I may point also to the absence of any allegation that any assets of Sharpe have come to the hands of the executors, unless the insurance money can be fastened upon as an asset ; again indicating the insurance money as the only fund. Further, the persons who are made parties indicate the same thing : the widow and children are proper parties as *cestuis que trust* of the fund, but not necessary or proper parties where administration of the personalty is sought ; and if a remedy against the realty were sought, the bill would properly be framed otherwise than it is, *i. e.*, on behalf of the plaintiff and all other creditors. All these circumstances indicate the *intuitus* with which the allegations in the bill are made.

The plaintiff's title to a decree for administration is rested upon the fact of there being a prayer for general relief, and there being, as it is contended, allegations in the bill which if true entitle the plaintiff to a decree for administration. I will assume for the present that the allegations if not made *alio intuitu* would be sufficient; but the question remains whether when they are made *alio intuitu*, as in my opinion they very clearly are in this case, the prayer for general relief will entitle the plaintiff to use them for a purpose different from that for which they are plainly made.

The case of *Stevens v. Guppy*, 3 Russ. 171, is an instance, and a very clear one, of the application of the rule of equity to which I refer. The bill was for specific performance of an agreement. The judgment of the Lord Chancellor sufficiently shows the point. He says at p. 184, "It is now admitted * * that as to some of the lands which formed an essential part of the property of this partnership, a good title cannot be shewn, and, therefore, the vendor cannot have a decree for specific performance. It is then said that although he cannot have the contract performed, he is entitled, upon the frame of this record, and under the prayer for general relief, to a remedy of a different kind, namely, to have an inquiry concerning the management of the partnership by Guppy, and to have compensation for the injury he, Stevens, has sustained. It is true that the bill does contain charges of mismanagement of the property by Guppy; but with what view and for what object are those charges introduced? We have only to look at the record to see that they are introduced, not with a view to demand compensation for any loss alleged to have been sustained, but in order to establish the fact of acceptance of the title by the defendant, and of waiver of all objections to it, and thereby to make out the plaintiff's right to specific performance. Under such circumstances, it would be unjust to allow the plaintiff to abandon the case made by his bill, and to come at the hearing for a new remedy upon a record framed with an aspect altogether different. My opinion, therefore, is that as the case is shaped before me the plaintiff is not

entitled, under the general words of the prayer, to particular relief with respect to the loss arising from the management of the property."

Every word of the judgment that I have just quoted, applies to the pleading that is before us.

Chapman v. Chapman, 13 Beav. 308, is a decision in the same direction. A bond creditor (I quote from the head note), claiming also an equitable mortgage on real estate, filed his bill for foreclosure, and in aid for the administration of the personal estate of the executors and the parties entitled to the mortgaged estate. He failed in proof of the equitable mortgage. *Held*, that he was not, on such a record, entitled to a decree as a specialty creditor for the administration of the real estate. Lord Langdale inclined at first to make such a decree; but when it was pointed out to him that there was "no prayer for the administration of the real estate, and no statement amounting to a claim to payment out of the real estate generally," a circumstance in which that case closely resembles the case before us, he said, "then the bill must be dismissed with costs as against all parties, and the plaintiff must go against the personal estate under the decree in the other suits."

I would refer also to *Feraby v. Hobson*, 2 Phill. 255.

There are cases certainly, in which the language of the Judges has been less definite than in the two cases from which I have quoted, where it has been said generally that if the allegations in the bill state a case which entitles a party to relief, he may, under the general prayer, have that relief, although he has prayed specifically for other relief; but I have seen no case in which relief has been granted under the general prayer, because some allegations made *alio intuitu* might be picked out which, by themselves, apart from the connection in which and the purpose for which they are made, would entitle the plaintiff to a decree. It would not be fair to a defendant to make a decree against him upon such allegations, allegations by which, looking at the whole scope and purpose of the bill, he would probably be misled and surprised.

No person, certainly, reading the bill in this case, could regard it as seeking a general administration. Its whole frame and scope are to state an equity which the pleader conceives creates a charge in the plaintiff's favour upon a particular fund.

It is contended, however, for the plaintiff, that it is not stated in the bill that the insurance effected by Charles Sharpe was made under the statute; that the date of its being effected is not given; that it may have been effected before the passing of the statute, and so may be part of the assets of the testator, not protected for the benefit of his wife and children.

In taking this ground the plaintiff is interpreting his own pleading as signifying something not in accordance with the primary and natural meaning of the words used by him. No word is used pointing to this insurance as otherwise than a valid and effectual insurance. The allegation in the seventh paragraph is, that Sharpe, prior to the death of his first wife, had insured his life in a certain life insurance company for a certain sum, in favour of his then wife and children. This imports, in the absence of anything to the contrary, that he had done so at a time and in a manner that was an effectual insurance for the purpose for which it was made; and that the fact was alleged in that sense the plaintiff himself makes apparent by alleging that the insurance money being paid by the insurance company to the executors, they "now hold the same *in trust*;" and he makes the wife and children, who should be *cestuis que trust* if the insurance were a valid one under the Act, parties defendants. He then shews for whom he means that the fund paid to the executors is by them held in trust. The words, "shall enure and be deemed a trust" are in the Act (R. S. O. ch. 129, s. 16), and it is to be assumed that the word "trust" is used in the same sense in the bill as in the Act. These are part of a series of allegations, the purpose of which is to shew the existence of an equity against this fund; and the trustees and *cestuis que trust* of the fund are made parties to answer this assumed equity;

and all the allegations are consistent and pertinent, if there was a trust fund ; while the suit is wrong as to parties, and the bill full of impertinent allegations, if there was no trust fund, in other words, no insurance in favour of wife and children, under the Statute.

In my opinion it does not lie in the mouth of the plaintiff to place upon his own pleading a construction which is at variance with the whole scope and tenor of his bill ; and we must read his allegation in the seventh paragraph as meaning that the insurance therein alleged was a valid and effectual insurance for the purpose for which it was effected.

My conclusion is, that the demurrer should have been allowed.

BURTON, J. A.—I entirely agree with the judgment just pronounced, and for the same reasons.

It is clear, notwithstanding the looseness of the pleadings, that the plaintiff bases his claim to relief on the ground that the insurance moneys do not form part of the general assets of the testator's estate, but belong in part at least to the infants, and should therefore, as he claims, be charged with the money alleged to have been advanced by the plaintiff for their use, and applied for their benefit.

The bill is a model of loose pleading. Scarcely a date is alleged for any material fact ; if any one thing is made to appear more clearly than another, it is that property of these infants has already been sold, and the proceeds paid out of Court for the payment of the very debt now again claimed, although unfortunately paid into the hands of the present defendants, and by them misapplied, instead of into the hands of the present plaintiff, who is their creditor, but who never, as far as I can ascertain, stood in that relation to the infants.

The allegation in reference to the policy itself is of the vaguest possible character.

We have no further information as to when it was effected, than that it was prior to the death of the first wife : it makes no reference to the Act to secure to wives

and children the benefit of assurances on the lives of their husbands and parents ; it does not even adopt the phraseology of the Act, but it does state that the moneys are held by the executors in trust, and it is on the basis of that trust that the specific relief is sought.

The defendants would, I think, have some reason to complain of relief being sought against them upon such bald statements as these, but I apprehend that under the present system of pleading the fact that the policy was effected under the statute would be held to be sufficiently averred, since it will be presumed that the allegations have that meaning which is necessary in point of law to support the pleading ; but it is not open to the pleader to avail himself of the ambiguity of his own pleading, and place upon it a construction entirely inconsistent with the scope and object of the bill and the relief sought. The alteration in the system was intended to avoid technical objections, but it would be introducing an element of uncertainty into legal proceedings if a plaintiff could avail himself of his own loose pleading to set up a case altogether different from that which the defendants had come prepared to meet.

The specific relief prayed for was the only relief which the draftsmen had in view when framing the bill, and it is manifest that the general administration now sought was an afterthought. To grant it under the general prayer would, to my mind, be contrary to the spirit of all rules of pleading, even under the present system, and would be an encouragement of the very practice of which I have been complaining, and operate most unjustly and prejudicially against defendants. Besides, as pointed out by the learned Chief Justice, the bill is improperly framed as to parties if intended merely to seek a general administration, and if the allegations in the bill are to be at all relied on, a general administration of an estate which has no existence.

I think the appeal should be allowed, with costs, and the demurrer allowed, with costs.

PATTERSON and MORRISON, JJ. A., concurred.

Appeal allowed.

ROBINS v. THE VICTORIA MUTUAL INSURANCE COMPANY.

Fire insurance—Loss—Proof within thirty days—R. S. O., ch. 62.

The judgment of the Court of Common Pleas, 31 C. P. 562, affirmed, BURTON, J., dissenting.

Sec. 2 of R. S. O. ch. 162, relieving the insured under certain circumstances from forfeiture for non-delivery of the proofs of claim, applies to Mutual Insurance Companies, and to the time of delivery as well as to insufficiency in the proofs.

Held, also, BURTON, J., dissenting, under the facts set out in this case, the omission to deliver the proofs in proper time, arose from accident or mistake, within the meaning of that clause.

Remarks as to the construction and effect of this clause, and the extent of the discretion given by it to the Court or Judge.

THIS was an appeal from the judgment of the Court of Common Pleas, reported in 31 C. P. 562, where the facts are fully stated, as also in the judgment of this Court.

On June 7, 1881, the appeal was argued. (a)

McCarthy, Q. C., for the appellants. The finding of the learned Judge, who tried the case without a jury, that the defendants' third and fourth pleas were proved was correct, and the verdict for the defendants on those pleas ought not to have been disturbed. Sec. 2 the R. S. O. ch. 162, does not apply to the defendants, being a mutual insurance company, and subject to R. S. O. ch. 161. But even if it does so apply it goes only to the question of the sufficiency of the proofs, and does not extend to the provisions of the statute, ch. 161, as to the time within which proofs must be furnished. Verbal proofs are in no way a compliance or partial compliance with the statute, and in this case the proofs were not delivered until upwards of four months after the fire: *Davies v. Scottish Prov. Ins. Co.*, 16 C. P. 176; *Ballagh v. Royal Mutual Ins. Co.*, 5 App. 87, 104-5. Even if the second section of ch. 162 does apply to these defendants, the evidence in this case clearly establishes that it was not through necessity, accident or mistake, that the plaintiff failed to comply with the condition of his policy. The fire

(a) *Present*.—BURTON, PATTERSON, and MORRISON, JJ.A., and CAMERON, J.

occurred on the 2nd October, 1878. No proof of loss was furnished until 12th February, 1879. Mr. Mills's letter of 28th November, 1878, gives the plaintiff express notice that no proofs had been furnished, and yet for nearly three months after that the plaintiff makes no effort to comply with the conditions: *Morrow v. Waterloo Mutual Ins. Co.*, 39 U. C. R. 441.

Lennox (of Barrie) for respondents. The judgment of the Court of Common Pleas is right. Whether sec. 2 of R. S. O. ch. 162, applies to mutual companies generally or not, it applies to and governs this case by *contract*, and the defendants are estopped from disputing its application by their own deed, the policy having printed on it under the "Statutory conditions" this provision: "Provided always that this policy is made and accepted subject to the statute above mentioned, which is to be used and resorted to to explain or ascertain the rights and obligations of the parties hereto, in all cases not herein provided for," and also these words: "Variations in conditions (applicable to mutual insurance)," followed by an express contract and representation, that the "Variations" (of which "Variations," the one in question is an exact copy of sec. 56, R. S. O. ch. 161), are not to be absolutely binding, but are to be in force only so far as they shall be held to be just and reasonable, to be exacted by the company: *Pollock on Contracts*, 2nd ed., p. 430, 580. The 2nd section of R. S. O., ch. 162, applies to all mutual insurance companies, as is evident from the language employed, the evil to be remedied, the nature of the remedy, and the state of the law at the time of its original enactment: *Ballagh v. Royal Mutual Ins. Co.*, 5 App. 87, 104; *Morrow v. Waterloo Mutual Fire Ins. Co.*, 39 U. C. R. 441. The evidence clearly brings the plaintiff within section 2, the plaintiff having been prevented by necessity, accident, and mistake from strictly complying with the condition, in that the first statement of proof was not in writing, although within thirty days; and the second and third proofs sent were not within thirty days, although in other respects sufficient; and the circumstances peculiarly call for the

protection of the Court to be exercised under the latter part of said section 2 against the "inequitable" defence set up, by the non-compliance relied on having arisen through the former mode of dealing between the parties, and the representations of the president Mills and the agent Scroggie. The 2nd section is not confined to the "sufficiency" of proof as appellants contend, but extends to every non-compliance with the condition as to proof—as well to the stipulation as to time as to that of form. The defendants waived and dispensed with all proof of claim further than the verbal statements given; (1) because the statement was a "statement" within the meaning of said second section, and defendants did not within a reasonable time point out that it was objected to and in what, &c. (2) The omission to furnish proofs as set forth in the pleadings was a non-compliance with the condition as to time, and was a mistake or accident within the said section, arising out of the defendants' acts. (3) The defendants within the thirty days promised payment by their president Mills. (4) The defendants disputing on the ground of misrepresentation within the thirty days dispensed with formal proof: *Grant v. Lexington, &c., Ins. Co.*, 5 Indiana 23; *Shannon v. Hastings Mutual Fire Ins. Co.*, 26 C. P. 380; *Walker v. Western Assurance Co.*, 18 Q. B. 19; *Manhattan Ins. Co. v. Stein*, 5 Bush Ky. 652; *Georgia Home Ins. Co. v. Kinnier* 28 Gratt. Va. 88, cited in U. S. Digest (1878) p. 415; *Sansum's Digest of Insurance Cases*, p. 1106, *et seq.* The proofs were sufficient, and in sufficient time, and all the equities are in favour of the plaintiff: *Mann v. Western Assurance Co.*, 19 U. C. R. 314; *Cammell v. Beaver and Toronto Mutual Fire Ins. Co.*, 39 U. C. R. 1; *Goldsmith v. Gore District Mutual Fire Ins. Co.*, 27 C. P. 435; *Hutchinson v. Niagara District Mutual Fire Ins. Co.*, 38 U. C. R. 483; *Mason v. Harvey*, 8 Ex. 819, 821; *Columbia Ins. Co. of Alexandria v. Lawrence*, 10 Peters 507, 514. Proofs were furnished within six weeks after the fire. The onus is upon the defendants of proving they were insufficient: *Platt v. Gore District Mutual Fire Ins. Co.*, 9 C. P. 405; and these proofs were never objected to. The fourth plea was abandoned on the argu-

ment of the *rule nisi* herein ; and at all events, the condition set up thereby is unreasonable within the meaning of sec. 35, R. S. O. ch. 161, as it imposes a greater burthen than the statutory condition of said statute, being said section 56 : *Ballagh v. Royal Mutual Fire Ins. Co.*, 5 App. 106-107.

McCarthy, Q.C., in reply.

November 28, 1881. BURTON, J. A.—The plaintiff sues upon a policy of insurance, and avers the performance of all conditions precedent.

The defendants set up as a defence under the conditions of the policy that the proofs, declaration, evidences, and examinations, called for by the conditions to be furnished within thirty days after the loss, conforming in this respect to the provision of the Mutual Insurance Act, which contains a similar requirement, were not so furnished within the time prescribed.

In reply to this, the plaintiff alleges that the insurance was effected through an agent of the defendants having authority to prepare the claim papers, who undertook to prepare them, and in reliance upon that promise he was prevented during the thirty days furnishing the proofs, as he otherwise would have done.

And a further replication, that he furnished the president of the company with a verbal statement of the loss and the other information to be contained in the statutory declaration ; and that Mills told him and led him to believe that nothing more would require to be done.

The learned Judge at the trial held, and properly held, that these replications were not proved, for, without going through the evidence, it is sufficient to say that it would be a travesty of justice to hold that there was any evidence to support them.

There was no plea to raise the question of whether the plaintiff was excused from a strict performance of the condition under the 2nd section of the R. S. O. ch. 162, nor was any application made at the trial to add such a plea.

The judgment of the learned Judge who delivered the decision of the Court below proceeds upon the sixth replication, which the learned Judge at the trial held to be not established in evidence. The gist of that judgment is contained in the following paragraph:

"In my opinion it was entirely owing to mistake that the condition was not strictly complied with. The plaintiff had furnished verbally to Mr. Mills the whole information in his power, and all that could be of any assistance to the defendants in considering his claim, and no objection whatever was made as to their not being in writing."

So that the mistake consisted in treating a verbal statement to the inspector as equivalent to the written proofs required, although the plaintiff admits that he knew of the necessity of such proofs and had employed a person to prepare them and thought he had done so. Conditions such as those relied on—conditions which are not only fair and reasonable for the company to exact, but which have been declared to be so by Act of Parliament—would be of very little use if they are to be thus frittered away, leaving out of view for the moment that the verbal statement so made did not contain the information required by the condition, as to which the company were entitled to the oath of the insured. The companies may at once erase the conditions from their policy if they are thus to be rendered nugatory, and I must be allowed to express my dissent from any such view as that expressed, that a condition can be thus complied with. But that, which is in effect an attempt to set up a waiver of the condition, is an entirely different matter from that which we are called upon to decide, which is whether the imperfect performance of the condition can be justified and made equivalent to a strict performance on the ground of mistake, and for that purpose I shall consider the matter as if the addition of such a plea had been applied for and allowed.

As one of my learned brothers is of opinion that if not coming within any of the cases mentioned in the section of necessity, accident or mistake, it may come within that

portion of it which vests a discretion in the Judge, whenever he considers it inequitable that the insurance should be deemed void or forfeited by reason of imperfect compliance with such condition, to declare that no objection to the sufficiency of such statement or proof shall be allowed as a discharge of the liability of the company.

Here again, as I have said, it becomes necessary for the plaintiff to allege in pleading, and sustain by proof, such a state of things as render it inequitable to raise the objection. As a general rule the question so raised could be decided on demurrer; but the discretion of course must be a judicial discretion, not one to be exercised arbitrarily by the Judge as if he were sitting as a director of the company, and declaring that as the defence set up as to the misrepresentation had failed, the other should be abandoned. We have nothing to do with the good taste or even the morality of the course pursued by the company, nor could we say, when the law sanctions a contract of this nature, that that discretion would be properly exercised because the Judge imagines, for that is all that can be said upon this evidence, that possibly the company sustains no loss by reason of the omission. I am not at all prepared to say that even if that were made as plain as the sun at noon-day it would warrant the Judges making a new contract between the parties. The company must in my opinion have done something which would render it inequitable in them to take advantage of the contract. No doubt where they are insisting on a deficiency which they had assisted in bringing about, it would be inequitable for them to do so, and a Judge would properly prevent it; but without hazarding an opinion as to the precise meaning of the enactment, I think it sufficient to say that no facts are shewn here to bring the case within it.

The section, as I have intimated, provides for three classes of cases in which the company are precluded from taking objections to the sufficiency of the *proofs actually delivered*, though not in strict compliance with the condition.

1st. Where the condition has not been *strictly* complied with by reason of accident, necessity, or mistake.

2nd. Where proofs have been *bona fide* delivered in pursuance of the condition, and the company objects upon other grounds than an imperfect compliance.

And 3rdly, where for any other reason the Court or Judge before whom the case is tried deems it inequitable that the insurance should be deemed void or forfeited by reason of imperfect compliance with such condition.

We may put the second and third of these out of view in this discussion.

I should have thought it reasonably clear that the section would apply to the time of the delivery of the proofs as well as to the delivery of the proofs themselves, but for an absurd consequence which would seem to follow that construction, which the Legislature certainly never contemplated, and which I think it is scarcely fair to assume they could have overlooked.

The objection arises to the sufficiency of the proofs actually delivered. On the assumption that time is included, we will assume a case under the first of the three excepted cases—necessity. The insured with due diligence could not complete his proofs within thirty days, but he could in forty; he delivers his proofs at the expiration of that time, and a replication to that effect would be a good answer; but supposing, having completed them in that time, he deliberately abstains from delivering them for three months longer, would he still be in a position to avail himself of the statute? He should not be, but the words of the Act are, where by reason of necessity the conditions of the contract as to proof have not been strictly complied with, no objection to the proofs delivered shall in such case be allowed.

The insured was prevented by necessity delivering them within thirty days, so that he is exonerated from strict performance, but there is nothing in the statute to limit the time of delivery after this necessity ceases. It furnishes to my mind a strong argument for concluding that the statute

was intended to be confined to the sufficiency of the proofs themselves, but I do not feel called upon to decide it, as I am of opinion that the plaintiff here has not brought himself within the statute.

We have I think, under the circumstances, to consider this question as if for the first time raised, and an application made to amend the declaration by striking out the averment of strict performance, and substituting for it an averment of a state of facts which would justify a jury in finding that the plaintiff had been prevented by mistake from delivering his proofs in accordance with the condition. There was no mistake within the meaning of the Act of Parliament, for the plaintiff proves that he was aware of the necessity of putting in formal proofs, and employed a person to do it. If the words negligence had been added to "necessity, accident, or mistake," I should be prepared to hold that the plaintiff had made out his case, but I am not prepared to hold that a contract which he has chosen to enter into, and which the Legislature has declared to be just and reasonable, and which is most essential, as experience has shewn, to enable insurance companies safely to conduct their business, should be frittered away by construing negligence as equivalent to mistake.

Thus treating the matter I have a right to disbelieve, as the learned Judge at the trial disbelieved, the evidence of the plaintiff as to what occurred with Mr. Mills, and I should decline to make the amendment. It is absurd to say that he was led into a mistake by anything Mr. Mills says, when he states in his own evidence: "I told Mr. Mills then I supposed that Scroggie had put in the claim papers."

The statute, though passed with a good object, is unquestionably a great interference with private rights and ought not to be extended beyond its clear meaning, and was not intended to extend to cases where a party uses so little diligence as not to send in papers for upwards of three months after the proper time, and nearly three months after he became aware that they had not been sent in.

I think the verdict for the defendants should be restored, and this appeal allowed, with costs.

PATTERSON, J. A.—For the purpose of the observations I have to make it is not necessary to refer particularly to the pleadings. It is sufficient to premise that the question is, whether the irregularity in the plaintiff's compliance with the condition respecting proofs of loss is cured by the effect of the second section of R. S. O. ch. 162.

The condition is in effect that which is contained in section 56 of the Act respecting Mutual Insurance Companies, R. S. O. ch. 161, which declares, amongst other things, that "the proofs, declarations, evidences, and examinations, called for by or under the policy, must be furnished to the company within thirty days after the said loss, and, upon receipt of notice and proofs of claim as aforesaid, the board of directors shall ascertain and determine the amount of such loss or damage, and such amount shall be payable in three months after the receipt by the company of such proofs." The condition indorsed on the policy does not vary this, but defines the character of the proofs &c., by reference to the statutory conditions, which are also indorsed, and shews that they are to comprise, (1) as particular an account of the loss as the nature of the case permits, and (2) a statutory declaration: (a) that the said account is just and true: (b) when and how the fire originated so far as the declarant knows or believes: (c) that the fire was not caused through his wilful act or neglect, procurement, means, or contrivance; and (d) the amount of other insurances.

The loss occurred on 2nd October, 1878. The proof papers were not furnished until 11th February 1879, four months after the loss.

Upon the construction of the contract which appears to me the necessary one, and which indeed has not been questioned, this delay would be fatal to the plaintiff's claim under the policy. It is true there are no words which directly impose forfeiture as the penalty for delay beyond

the thirty days ; but when it is declared that the proofs &c., *must* be furnished within thirty days, and that after the receipt of proofs of claim *as aforesaid* the directors are to determine the amount of the claim, and that the amount shall be payable in three months after *the receipt of the proofs*, I apprehend we must take this to mean after the receipt of the proofs furnished *as aforesaid*, or, in other words, within thirty days.

Before considering the enactment upon which the plaintiff relies to avert the forfeiture, it will be useful to ascertain, if we can, how it happened that the proofs were not sent in in proper time.

Unfortunately we have no finding of this as a fact by the learned Judge at the trial.

There is a story told by the plaintiff and his son about Mr. Mills, the president of the defendant company, after getting from them what information he could respecting the fire, telling the plaintiff that the money would be paid without more on the plaintiff's part. Mr. Mills denies this. We have not the advantage of having the fact found at the trial. For my part I have not the slightest idea that the president of the company ever said a word to the effect stated by the plaintiff and his son. But the plaintiff's own evidence makes it perfectly clear to my apprehension that it was not in reliance on the alleged representation or promise that he deferred sending in his papers. He shews that all along he depended on Mr. Scroggie preparing them, and, as he puts it, doing whatever was necessary. There is not a trace that I can find, either in what he says of the matters talked of or done within the thirty days, or in his later communications with Scroggie, or with his attorneys, or with the company, of any assertion that he was misled as to the necessity for the formal papers by anything which the president either said or did. And it strikes me that the palpable absence of any such assertion accounts for the want of any finding of fact on the subject of the conflicting evidence respecting the interview with Mr. Mills. It must have seemed immaterial, because it could

not be used as proving a promise which would bind the company, and it was not put forward as a reason why the papers had not been duly forwarded.

The truth, as I gather it from the evidence, is, that the plaintiff depended on Scroggie, and Scroggie failed him. Whether he misapprehended the plaintiff and did not understand that he had been instructed to act for him, or simply neglected his business, the result was the same; and the only reason given for the plaintiff's default in furnishing proofs, so far as I can find from the plaintiff's evidence, was, that Scroggie did not do it.

I think the plaintiff really did rely upon Scroggie doing what was necessary. Undoubtedly he ought to have known that he had himself something to do personally, viz, to make a statutory declaration; but then he had neglected to get his policy into his hands, and may be credited with having been innocently ignorant of the exact terms of the condition. Scroggie had acted for him on one or two similar occasions; and he, without taking pains to understand his position, left all, as he supposed or intended, to the same agent this time. He knew, some time after the thirty days had elapsed, of the default which had taken place. He was especially informed of it by letter of 28th November, from Mr. Mills, but allowed months after that to pass before his proofs were furnished.

Let us now turn to the statute R. S. O. ch. 162, sec. 2.

I agree with the learned Judges in the Court below in holding that this section applies to mutual companies.

The section enacts that no objection to the sufficiency of the statement or proof of loss shall be allowed as a discharge of the liability of the company on the contract of insurance, wherever entered into, in any one of three cases: viz.

1. Where, by reason of necessity, accident, or mistake, the conditions of the contract of fire insurance have not been strictly complied with:

2. Where, after a statement or proof of loss has been given in good faith by or on behalf of the insured, in

pursuance of any proviso or condition in the contract, the company, through its agent or otherwise, objects to the loss upon other grounds than for imperfect compliance with such conditions; or does not, within a reasonable time after receiving such statement or proof, notify the assured in writing that such statement or proof is objected to, and what are the particulars in which the same is alleged to be defective; and so from time to time:

3. Where, for any other reason, the Court or Judge before whom a question relating to such insurance is tried or inquired into considers it inequitable that the insurance should be deemed void or forfeited by reason of imperfect compliance with such conditions.

The second of these positions is inapplicable to the facts before us, and may therefore be for the present left out of view.

The third is wide enough in its terms to suggest a possible risk of modification of contracts according to the impression a Judge may receive of the hardship of a particular case, or the lack of generosity in insisting upon a plain and reasonable stipulation. It will be unfortunate if, as seems to me not impossible, the application of the clause shall be found to substitute the discretion of the Judge for the contract of the parties to an extent which may make it difficult for companies to know what their rights are.

I confess I have not been able to form a very definite conception of the principle on which the equity or inequity of insisting upon the forfeiture of an insurance for non-compliance with the conditions respecting proofs of loss should be tested. I am inclined to think that we must read the word "inequitable," as meaning simply "unjust," and not as referring only to rules of decision adopted by Courts of Equity; but upon what distinct ground, other than those set down in the first and second clauses, it should be held that a condition, reasonable in itself, is not to be insisted on, I am not at present prepared to decide. One rule however strikes me as a safe one, and as

sufficient in the present case. *Prima facie* a man must be bound by his contract. The onus of shewing that it is inequitable to enforce it is upon him. It is not enough that I am unable to point out any specific harm accruing from its non-observance. To require that is to shift the burden, and call upon the company to show that it is equitable to insist upon what has been bargained for, which is not what the clause demands. In this case the contract required a statutory declaration covering several important particulars, involving liability to punishment if false, and forming the foundation for further inquiries and proofs as specified in the condition. It would be unreasonable to deprive the company of all benefit of these provisions, or of the stipulation that the documents shall be furnished within the time fixed by the statute, while the occurrences are recent, merely because it may be impossible to show that the statements and declaration which never were furnished, or which were kept back for months, would not have been of service if furnished sooner. I do not read the clause as having such an effect as that. I read it as making it necessary for the person in default to shew affirmatively that his default cannot be justly urged against him, for some reason other than those covered by the two earlier clauses. I do not think the plaintiff in this case has done this. I do not find that he did anything equivalent to furnishing the statement and statutory declaration; and I do not think he has shewn any "other reason," why it is inequitable in the company to hold him to his contract. In my opinion to decide otherwise on this point would be in effect to hold that the condition is an unjust and unreasonable one, which, in the face of the statute which gives it, is out of the question.

We come therefore to consider the first branch of the clause.

I have here again some difficulty in forming an opinion which is quite satisfactory to myself on the point which is the important one in the present case, whether the clause relates at all to the time within which proofs are to be

your agent and have the matter arranged as soon as possible, and oblige, "Yours truly,

"WILLIAM ROBINS,

"Barrie, P. O., Ont."

The policy, by condition indorsed, required that proofs of loss should be furnished by the insured within thirty days after the loss occurred, and the defendants pleaded this condition in bar of the plaintiff's right to recover. The plaintiff replied, taking issue; and also specially, by way of equitable replication, that the insurance had been effected with the defendants through James Scroggie their agent, who had authority to solicit, make out, and forward applications, to deliver policies, and to collect and transmit premiums, to assist in or prepare the account or particulars of loss and declarations and proofs, and having authority to furnish and deliver the proper blank papers and forms for that purpose, and that shortly after the loss, and in sufficient time to admit of the proofs being forwarded to and received by the defendants within the thirty days the plaintiff not having the policy in his possession and having no knowledge of what would be required to be done, consulted the said agent as to what steps he should take, and the said agent thereupon promised, if he would leave the matter in his hands, that the said agent would attend to it in such manner as the case required, and would see that the defendants received all necessary and proper information, papers, declarations, and other documents within such time as was limited by the conditions of the policy; and the plaintiff relying thereon was prevented from taking such steps as he otherwise would have taken to furnish the proofs required, and he was not aware that such proofs had not been furnished until after the thirty days had expired. The plaintiff further replied, that George H. Mills, Esq., was at the time of the loss by fire, and for thirty days thereafter the president of the company, and the plaintiff after the said fire, and within thirty days, furnished the said George H. Mills, as such president as aforesaid, by verbal statement with as particular an

account of the loss as the nature of the case permitted, of the amount of the said loss, and all other information in the statutory declaration required, and after furnishing the said information the plaintiff enquired of the said Mills whether anything further was necessary to be done by him in order to entitle him to receive the moneys mentioned in the said policy or before the defendants would be ready to pay the same, and thereupon the said George H. Mills, informed the plaintiff and led him to believe that nothing more would require to be done, and that the money would be paid shortly thereafter by the defendants; and the plaintiff relied upon the information so given, and was induced thereby to abstain from putting in the formal proofs. The defendants joined issue on these replications, and specially rejoined that the said Scroggie and Mills had no authority to waive any condition of the policy, and that the condition had not in fact been waived.

The plaintiff, who was examined as a witness on his own behalf, swore that the fire occurred on the night of the 2nd October. "Everything covered by the insurance was destroyed, dwelling-house, and all the stables and out-buildings. The first thing I did after the fire, I went to Victoria and made enquiries about the origin of the fire. I ordered William Dodson to notify the company. He did so. On the following Monday I think I sent a post card to Mr. Scroggie the agent. After that I saw Mr. Scroggie; I saw him I think that week, I met him in Barrie. He is the agent for the Victoria Mutual Insurance Company. He said, well you have got burned out again; I said yes. I then asked him if he had attended to it. I supposed he had been and seen the fire, and he said he had been down. He then asked me what I was going to do about it. I told him I wished him to attend to it as he had done before. He then said that he would attend to it, and I told him to be sure and attend to it, and have everything done properly." Q. "You said, 'as he had done before,' what was that?" A. "I had got burned out by fire; the same company and he attended to it; he got my money for me. Mr. Davidson

and my son were with me" (at the interview with Scroggie about the present fire). "This was about a week after the fire. I saw Mr. Scroggie again some two or three days after, or probably four days. I saw him in the Barrie Hotel. I asked him if he had attended to that yet, and he said he had not. I asked him why. He said he had not the policy, and he would have to go and see the grounds where the buildings stood before he could make out his papers. That would be about ten days I should judge after the fire, between eight and ten days. There was nothing more said between me and Scroggie that I can remember. He said he would attend to it immediately. He said he was going home that way and that he would attend to it, * * Mr. Davidson and my son were present on that occasion."

Q. "After that and within thirty days did you see any one else with reference to the policy? A. I saw a man they call Mr. Mills. He stated to me that he was inspector for the Victoria Mutual Fire Insurance Company." (He pointed Mr. Mills out in Court). "Mr. Mills came to my place some two or three days probably after I saw Mr. Scroggie the second time, and he represented himself to me as Mr. Mills the inspector of the Victoria Mutual Fire Insurance Company. He requested me to come to the Barrie Hotel about ten o'clock, I think he said, and to bring my son with me; that was at Victoria the night of the fire. I did so, and we went into a room, and he took a statement of my boy as near as he could recollect what had occurred the night of the fire, and he took my statement as near as I could recollect what I had heard. After he had taken his statement, I asked him if he could give me any idea how long it would be before the company would pay, or if I had anything more to do. I said the company as I have heard can keep it sixty or ninety days if they wish. He said the company would pay small sums such as that; there was nothing else that I would have to do; that he thought the money would be forwarded in a few days. I told him it was likely that I would wish to build,

and of course if I got it soon I could build this fall. I saw Mr. Scroggie; it might be between five and six weeks after the fire. I am quite positive as to that. I met him in Barrie on the other side of the Wellington Hotel. I said I suppose you have attended to this and made it all right; it is about time I would be getting my money now. He said 'Oh, I have not done anything yet.' I asked him how was that. Why said he 'I thought that you did not altogether want me to attend to it.' Said I, 'I agreed with you to attend to it didn't I;' 'Yes;' and you said you would do it well; 'yes, but I thought afterwards that you did not want me to.' Up to that time I did not know whether it had been attended to or not. I said it was a very curious thing that he had not attended to it when he agreed to. I said he had better attend to it now and he said 'No.' I asked him what I had better do. Said he you can put in a claim yourself. Said I, I don't know anything about putting in a claim, how can I do it, so he told me how to put it in, and I went home and wrote out a claim as near as what he told me, and I sent it to the company. I followed his instructions as near as I could remember. I sent a claim to the company—that was between five and six weeks after the fire. In cross examination he said in answer to the question, do you know of your own knowledge what Scroggie's powers are. A. "His powers are as an agent." Q. "Do you know of your own knowledge?" A. "I know that he always did my business. He always insured the last fourteen or fifteen years for me. I have been burned out twice, and claimed damages once. * * It was always with this company. Scroggie prepared my papers on both occasions."

The plaintiff's son Edgar Robins corroborated the plaintiff's statement as to what took place between the plaintiff and Scroggie after the fire about attending to the matter. And another witness, Marshall Davidson, also agreed substantially with the plaintiff as to what took place at the interview between the plaintiff and Scroggie on the street; but he differed from the plaintiff in his account of the

conversation at the Barrie Hotel if the part of the conversation he heard related to putting in the proofs, as he swore that Scroggie said he had attended to it, while the plaintiff's statement was that Scroggie said he had not attended to it but would.

Scroggie was not called by either party. The only evidence offered on behalf of the defence was that of Mr. Mills, the president of the company, who swore. "I remember coming up to Mr. Robins after receiving notice of the loss. I saw both father and son in the Barrie Hotel. I remember making an investigation as to the position of the property." Q. "And he described the property in this way to you, did he--referring to diagram?" A. "Yes, that is his own shewing. When I found that out I said that that was contrary to the diagram on the application—that the workshop shewn here was not shewn on the application. * * I think I shewed him the diagram, and told him that was a misrepresentation, that had we known of the existence of the workshop it would have been contrary to our rules to have accepted the building at all in the general branch in which he was insured. I do not remember what reply he made. I told him that the policy was void in consequence. He said he would see about that." Q. "Did he ask you had he anything more to do?" A. "I have no recollection that he asked me any such question." Q. "Was there any conversation about time of payment?" A. "No conversation further than that I told him I could not recommend payment of his claim. There was no conversation about sixty or ninety days." Q. "He states here that he asked you whether he would be kept out of his money for sixty or ninety days, as he understood could be done under the conditions of the policy. Do you remember him saying that to you?" A. "I do not." Q. "He states in reply to that you told him no, that as the amount was small the money would be forwarded in a few days, is that true?" A. "I swear positively and distinctly that is not true."

He further stated he had been president of the company since 1863, and engaged in the management of the business.

"It was undoubtedly material for me to know about that workshop, whether it was a workshop or not. We did not take workshops except in what is called water-works branch, that is where there is a supply of water in cities and towns. If it had been only a store-house we might have accepted it. I did not know it was a work-shop till he informed me. He told me it was a work-shop; that is all I know about it. I wrote work-shop down there at the time he drew that diagram. I do not remember that I asked him what kind of a work-shop."

In cross examination, he said, "When I put down workshop used by me, I meant by Mr. Robins. He told me that he used it as a work-shop. He did not tell me anything more about that that I remember. He may have told me what it was used for at the time it was insured; I have no recollection. If this had been described as a workshop we would have declined it, because there were no water-works in the place. I am the president of the company. I have also adjusted the claims of the company for a number of years. We have not an inspector in connection with the company; any inspecting that is done on behalf of the company I do." Q. "I suppose if you had found this claim of Mr. Robins satisfactory, in your position of president and inspector you would have settled it?" A. "Yes I could have recommended its settlement to the board, and the probability is that they would have complied with my recommendation." Q. "Do you sometimes go out and make an inspection of this kind, and then pay off the claims without anything further being done, I mean without any proofs being put in, where you had things satisfactory?" A. "We have done it. In the 17 or 18 years there must have been numerous cases of that kind." * * Q. "What time was it you told Mr. Robins that this misrepresentation would be an objection to his claim, was it near the first conversation or near the last?" A. "It occurred when he told me the fact. When I went in I first asked the lad to give me his story as to the cause of the fire, and he did, and then I asked Mr. Robins. I am not sure whether

that would be before or after I got him to draw me the diagram, but I should suppose it would be after I had examined him with regard to the fire that I asked him about the other. I think I did not get the diagram the first thing after I went in. I cannot speak with positiveness of that, but I think from looking at my note book and altogether, that that would follow getting a history of the affair."

In reference to the authority of Mr. Scroggie he said he takes risks—takes applications and forwards them. The premiums are all collected at head office. "I think he may often forward money to us. I think people in the country get him to forward money. I do not know that it is a frequent case, but it has been done. Then we forward the voucher to him. When a fire occurs the proof papers are usually prepared by the parties; we have blank forms that we use." Q. "And when you do not come down yourself do you forward them to somebody?" A. "Yes." Q. "To whom do you forward them in this neighbourhood?" A. "Forward them to the man himself. That is Mr. Booker's business, and I am only speaking now from recollection. I cannot speak positively of ever having seen one of these proofs of claim forwarded by Mr. Scroggie in his handwriting. The proofs of claim are usually made out by a magistrate."

The plaintiff in his evidence swore that during all the time of the insurance the building called work-shop was used as a store-house; that the plaintiff had not lived on the premises during the insurance. One Peacock, who was a labouring man, was living there. Mr. Scott used the place for storing coffins.

The case was tried at Barrie, before Mr. Justice Osler, without a jury. He found in favour of the plaintiff, on the plea setting up misrepresentation, and for the defendants on the plea setting up that the proofs had not been put in within thirty days or as soon as practicable.

In the following term, the plaintiff obtained a rule *nisi* to set aside the finding of the learned Judge in favour of the defendants, and to enter a verdict for the plaintiff

according to the provisions of the Administration of Justice Act, on the ground that the verdict was contrary to law and evidence, and because the non-compliance with the conditions in respect to proofs was the result of necessity, accident or mistake on the part of the plaintiff, and because, when the required proofs were put in, the defendants objected to the loss on other grounds than the imperfect compliance with such conditions, and because the defendants did not within a reasonable time after receiving the statement of proof notify the insured in writing that such statement or proof was objected to, and specify the particulars in which the same is alleged to be defective.

This rule was made absolute, the Court being of opinion that it was by mistake that the condition of the policy with regard to the proofs had not been complied with within thirty days after the loss.

I am of opinion that the conclusion arrived at by the Court of Common Pleas is well supported by the evidence. From the tenor of the letter written by the plaintiff to the defendants notifying them of the loss, it is clear the plaintiff was under the impression that his claim would be arranged through the agent of the company with whom he had effected the insurance, as he says therein, "please notify your agent and have the matter arranged as soon as possible;" and apparently under this belief he went to see the agent Scroggie and arranged with him to do whatever was necessary to entitle him to get the insurance money; and it is clearly proved by the evidence of himself and son, that Scroggie promised to attend to the matter, and do what was necessary to be done to enable the plaintiff to get paid. The evidence of the president of the company, Mr. Mills, establishes that Scroggie was not the agent of the company for this purpose, and the plaintiff was mistaken in his belief that he was; and through this misapprehension on his part, and the neglect of Scroggie to do what he promised, the proofs were not put in within the period of thirty days in compliance with the condition requiring them to be so put in.

The statute is silent as to the kind of mistake that will excuse this breach of the conditions, and the word must be construed according to its usually accepted meaning, and a mistake, according to the *Imperial Dictionary*, is an error in opinion or judgment, misconception, a slip, a fault, an error, which will cover the reason of the plaintiff's neglect; and assuming that the agent Scroggie, as stated by the plaintiff, and his statement is uncontradicted, had really been under the impression that the plaintiff did not quite want him to prepare the proofs, and in consequence had not done so—this would also have been such a mistake as would relieve the plaintiff from a strict compliance with the condition. But whether Scroggie made this mistake or not is not sufficiently proved, as what passed between the plaintiff and him would not be legal proof of this, not being established by Scroggie's own evidence under oath, though the conversation between him and the plaintiff would be evidence to shew a mistake on the plaintiff's own part.

Again, the Court of Common Pleas have apparently taken the view that the plaintiff neglected to furnish the proofs by reason of his having furnished verbally to Mr. Mills the information he was able to give, and was under the impression this was all that was necessary for him to do. Mr. Mills, while he admits the examination of the plaintiff by him said, that he had no recollection of his having been asked by the plaintiff whether he would have anything more to do, and thus the mistake in this respect would not be so clearly established. I incline to the view, however, that the judgment of the Court of Common Pleas may be sustained, on the broad and clear ground that it would be inequitable that the insurance, upon the facts presented by the evidence in this case, should be deemed void or forfeited by reason of the proofs not having been delivered within thirty days after the loss occurred. The company had within seventeen days after the loss, from the personal examination by the President of the company acting in the capacity of the in-

spector into the circumstances attending the fire, and his direct questioning of the plaintiff and his son, obtained all the information the plaintiff could give him; and from a misapprehension as to the workshop having been used as such during the insurance Mr. Mills came there and then to the conclusion to resist the claim—that is, taking his account of what took place between the plaintiff and him to be correct. Of course, if the plaintiff's account is to be accepted, that Mr. Mills promised to pay the loss, nothing could well be conceived to be more unjust than to permit the objection now to prevail. But taking Mr. Mills's account to be the more accurate narrative of what took place, it seems to me to hold that the non-delivery within thirty days of the proofs—that so delivered could not have benefited the defendants in the least, or influenced them in the course they would pursue—would be completely to set aside and prevent the remedial operation of the statute, which imposes upon the Court or Judge before whom the question is tried the duty of saying whether it would be inequitable to deem the insurance void or forfeited; for if it would not be inequitable so to hold in this case I fail to be able to appreciate what would be inequitable or contrary to natural justice.

It may be argued that this duty on the part of the Judge or Court does not arise unless the circumstances partake of the character of necessity, accident or mistake; and that the Legislature never intended to leave it simply to the conscience of a Judge to say at his pleasure it would be inequitable to hold an insurance void or forfeited, no matter what the non-compliance with the condition might be, as that would be an undue interference with the right of parties to enter into such contracts as they thought fit. But I think the operation of the statute is not so narrow or restricted, and it gives absolutely, and without any manner of qualification, the right to the Judge or Court before whom a question of insurance is being tried to say whether or not it would be inequitable, which I take to mean contrary to natural

justice, to hold an insurance void by reason of any imperfect compliance whatever with the condition respecting the furnishing of proofs after the loss.

The power, after all, is not a very extensive one; it will never deprive an insurance company of any really meritorious defence, no matter how arbitrarily it may be exercised, and it is not wanting in the sanction of previous legislation interfering with the power of the parties to contract as they please. As, for instance, by the English Railway and Canal Traffic Act, 1854, wherein it is provided that the Court or Judge before whom any question relating to a condition shall be tried, the Court may say whether the condition is just and reasonable, without any guide being furnished by which what is just and reasonable may be determined. And under section 6 of the Act now under consideration, and section 35 of the Act under which the defendants exercise their powers, ch. 161 R. S. O., it is left to the Court or Judge to determine whether a condition is just and reasonable or not, and if not just and reasonable it is made null and void. When the Legislature has thus clearly given to Courts and Judges the power of determining whether a condition shall be void altogether, it cannot be considered at all unlikely that by apt words it should have intended to give the less power of saying under what circumstances it should be deemed an otherwise valid condition should be inequitable, in other words unreasonable. By section 2 of ch. 162, R. S. O. there are five cases in which imperfect compliance with a condition of a policy requiring the delivery of proofs shall not avoid the policy. They are where the same has been prevented: 1, by necessity; 2, accident; 3, mistake; 4, where the proofs have been given, and the company through its agent or otherwise objects to the loss upon other grounds than imperfect compliance; and, 5, where the company does not within a reasonable time after receiving the proof notify the insured in writing that such proof is objected to and what are the particulars in which the same is alleged to be defective. In all these five cases no objection to the

sufficiency of the proof shall be allowed as a discharge of the liability of the company. And then follows a sixth and last class of cases, where the Court or Judge may exercise a discretion, that is to say, under the circumstances given in evidence may determine whether it would be inequitable, in other words unreasonable or unjust, to allow the imperfect compliance with the condition to cause a forfeiture of the policy and relieve the company from liability.

In the present case the condition was in fact complied with by the delivery of the proofs after the thirty days, but the compliance was imperfect by reason of the non-delivery within thirty days as required by the condition.

Mr. McCarthy contended with great force that the statute had no application to the defective proof in this case, that it only covered the case of imperfection in the substance or form of proof duly delivered within the time limited by the contract, and does not reach or meet the objection to the delivery of the proof after the limited time: that the language "no objection to the *sufficiency* of such statement or proof or amended or supplemental statement or proof" is inapt and unsuited to meet an objection based not on want of form or substance in the proof or statement delivered, but solely on the ground that the proof was not delivered in proper time.

It seems to me, though plausible, it is not well founded, for the whole clause must be read together, and so read it is manifest the Legislature intended the relief afforded to apply to all kinds of objection to the proof being a compliance with the condition. The first paragraph of the clause is, "Where by reason of necessity, accident, or mistake, the *conditions* of any contract of fire insurance on property in this province, as to the proof to be given to the insurance company after the occurrence of a fire, have not been strictly complied with," and which brought in connection with the enacting clause "no objection to the sufficiency of such proof shall be allowed to

discharge the company from liability," must surely be held to extend to this supposed case. The last day for the delivery of the proofs is the 2nd November. The insured resides at Cornwall. In the ordinary course of post the proofs mailed there on the afternoon of the 1st of November, would reach Hamilton, the place of the head office of the company, on the afternoon of the 2nd, but by an accident the train is delayed and the proofs do not reach Hamilton in consequence until the afternoon of the 3rd, too late to comply with the condition. The proofs in form and substance comply with the requirements of the condition; in the matter of time they do not, and so in the language of the statute the condition has not been strictly complied with.

If the statute does not cover this case, it is very much restricted in its remedial operation. If it does extend to this supposed case, it covers a defect in time as well as any other defect. And in my judgment it does. Full effect would not be given to the words, "where the *conditions* as to the proof to be given are not strictly complied with" to hold otherwise. The relief is against a breach of the condition relating to the proofs. If any of the grounds of relief pointed out by the statute apply, there is no limit of time within which the error or omission with regard to the proofs must be rectified or supplied. The fact then that the proofs were not furnished for four months after the fire in the present case, if the omission to supply them within thirty days was the result of a mistake, will not disentitle the plaintiff to the benefit of the statute. Once the thirty days had elapsed it was impossible to comply with the terms of the condition, and I do not see that any power exists in the Court to make any other limit.

By another condition, that numbered 16 of the policy, the loss is not payable until thirty days after the proofs are completed. The delay in the delivery was a loss to the plaintiff and a gain to the defendants, and though such delay might in some cases furnish a reason why holding the policy forfeited would not be inequitable, under the

circumstances in this case no such reason exists. Upon the point whether the pleadings properly admit of the plaintiff setting up the answer of mistake or inequity, the plaintiff's replications do not in form allege either ground, but they set out the facts, and if these facts make out the statutory bar to the plea the plaintiff is entitled to invoke their aid to sustain his case, and he should be allowed to amend if necessary, but it is not necessary as the matters replied make a legal answer to the pleas.

The remaining question presented by the reasons of appeal and the argument of counsel is, does the clause of the statute under consideration apply to Mutual Insurance Companies. In *Bullagh v. Royal Mutual Ins. Co.*, 5 App. 87, in this Court, my brother Patterson appears to have considered the question, though its decision was not essential in that case, and expresses himself with reference thereto in the following language, at p. 104: "I say nothing of the second section of ch. 162, which is from the Act of 1874; (38 Vic. ch. 65) and does not relate to the character of the conditions. There may be no reason against applying it to all insurances; and it was doubtless originally intended so to apply." The Court of Common Pleas adopted this view, in which I fully concur.

I think the appeal should be dismissed, and the judgment of the Court of Common Pleas affirmed, with costs.

MORRISON, J. A., concurred that the appeal should be dismissed, with costs.

Appeal dismissed.

MCLAREN V. CALDWELL ET AL.

Streams — Public highways — Floating timber — Improvements — Private rights—C. S. U. C. ch. 48, sec. 15—Costs—Appeal Act—Stay of execution under.

The plaintiff, a lumberman, was the owner in fee simple of several parcels of land and large tracts of timber. A stream, on parts of the bed of which he had the fee simple, ran through his lands, which, in its natural state, had not the capacity for floating timber at any time of the year. The plaintiff, and those through whom he claimed, spent large sums of money in making improvements upon the stream and in deepening it, and thereby making it floatable. The defendants, who owned the timber limits in the neighbourhood, claimed the right to float their timber down the stream.

Held, reversing the judgment of PROUDFOOT, V.C., BURTON, J.A. dissenting, that the stream was a public waterway by virtue of C. S. U. C. ch. 48, sec. 15, which by its terms, applies to all streams, whether of natural capacity to permit timber to be floated down them or not; and that the defendant had the right to float timber down the same stream during the spring, summer, and autumn freshets, without compensation to the plaintiff. The appeal was allowed without costs, as the improvements had been made and the bill filed, relying on the authority of *Boale v. Dickson*, 13 C. P. 337, which was properly followed by the learned V. C., but was overruled by this Court.

Per BURTON, J. A.—By the common law those streams only which are sufficiently large to float boats or transport property are highways by water, and not small streams which are not susceptible for use as a common passage for the public. The statute was not intended to confer any new right, but to remove all doubt as to the right of lumberers to use all streams capable, in their natural state, of transporting timber, even although only in times of freshets.

THIS was an appeal by the defendants from the decree of Proudfoot, V. C.

The cause came on for examination of witnesses and hearing before Proudfoot, V. C., who held that neither of the streams upon which improvements had been made by the plaintiff were in their natural state, even in freshets or high water, floatable, and made a decree granting the injunction prayed for. No written judgment was delivered.

The defendants appealed.

The case was argued on the 26th, 27th, 30th, 31st May, and 1st June, 1881 (a).

Bethune, Q.C., and *C. Moss*, Q.C., for the appellants.

(a) *Present*.—SPRAGGE, C.J.O., BURTON, PATTERSON and MORRISON, JJ.A.

The Vice-Chancellor erroneously rejected evidence tendered by the appellants for the purpose of shewing that at the time when the Statute 12 Vic. ch. 87, was passed no stream in Upper Canada, which was used or useful for the transmission of logs or timber, was then or now sufficient, without artificial aids, to float saw logs, timber, rafts, and other craft during the spring, summer, and autumn freshets any more than the stream in question in its various parts. The learned Vice-Chancellor declined to receive this evidence, although the appellants urged that the judgment in *Boale v. Dickson*, 13 C. P. 337, and the cases which followed that case in the Court of Common Pleas were erroneous, and informed him that the appellants proposed to carry the case to this Court for the purpose of challenging the accuracy of those judgments in order to ascertain what was meant by the term "all streams," as used in the statutes. It was necessary for the Court to have the information as to the state of the streams in Upper Canada at the time when these statutes were passed by the Legislature, and the Vice-Chancellor was entitled to look at the state of the streams at that time as one of the circumstances surrounding the matter with which the Legislature was then professing to deal. See *Attorney-General v. Earl of Powis*, 1 Kay 207; *Logan v. Earl of Croulton*, 13 Beav. 29. *Prima facie* the term "all streams" would include the streams in question in this cause, and that conclusion would be strengthened if the fact be that there were and are no streams in Upper Canada, in a state of nature and without artificial aids, that would float saw logs, timber, rafts, and other craft during the spring, summer, and autumn freshets in any considerable quantity; and if these streams would not, without artificial aids, float logs or timber at all, the case for receiving the evidence is still stronger. Enough evidence, however, was got on the cross-examination of plaintiff's witnesses to make it probable that the defendants would be able to establish that fact, if indeed it be not established; and the learned Vice-Chancellor therefore ought to have received the testimony rejected

Nor should the evidence of the persons who saw the stream in question after the improvements had been made have been rejected. The Vice-Chancellor was of opinion that it was impossible for persons who had not seen the stream in a state of nature, but had only seen it after some blasting and other improvements had been done upon it, to form an opinion whether or not it would have been floatable in a state of nature; but this is, it is submitted, simply a question of weight of evidence. All the persons whose evidence was rejected were of opinion that, from their examination, and having regard to the small amount of blasting that was proved to have been done, they could form such an opinion, and their evidence therefore ought to have been received. Evidence of persons resident in the county of Lanark, to impeach the veracity of one Avery, a witness called by the defendants, should not have been received. It was shewn that Avery had left the county of Lanark fourteen or fifteen years ago, and during that time he resided at Seaforth, in the county of Huron. The learned Vice-Chancellor allowed persons who had lived in the same neighbourhood as Avery before he left the county of Lanark to give evidence as to his reputation for veracity while he lived in that county, none of these persons having any knowledge as to his reputation for veracity at the time when he gave his evidence, or shortly before. It is clear that evidence of that kind ought not to be received within the rules applicable to the impeachment of evidence. It is quite clear that the Attorney-General was a necessary party to this suit, and the decree ought not to have been pronounced in his absence. Both apart from and under the Statute 12 Vic. ch. 87, the right to float logs or timber down is a public right, and the appellants claim that they are entitled to exercise this right as one of the public, and as having timber limits from the Crown, which will be valuable only if the right to float logs down this stream exists. No decree ought to have been made which has the effect of declaring that this stream is a private stream, without having the Attorney-

General before the Court, in order that the question of this public right may be disposed of. The Vice-Chancellor was of opinion that upon the authority of *Boale v. Dickson*, already referred to, no part of the stream in question was floatable for logs or timber during freshet time in a state of nature. But upon the evidence as given here it is clear that in a state of nature during freshet time the said stream was floatable for saw logs without artificial aids of any kind. The quantities which might be brought down in a state of nature and without artificial aids would no doubt be small, but the fact that logs could be brought down in small quantities made the stream a floatable stream apart from the statute altogether. Artificial aids, such as restraining dams, bench dams, and side jambs, no doubt increased the capacity of the stream very much, but at common law, apart from this statute altogether, a stream which would, from its source to its mouth, in a state of nature, float logs or timber without any artificial aid, would be considered navigable as that term has been understood in Canada and other parts of America. The statute 12 Vic. ch. 87, must have been passed therefore, for the purpose of applying to streams which throughout their whole course would not have been floatable without artificial aids, otherwise there would have been no use whatever in passing the statute: See upon this point, *Olson v. Merrill*, 42 Wis. 203; *Whistler v. Wilkinson*, 22 Wis. 573; *Essen v. McMaster*, 1 Kerr, N. B. Rep. 501; *Rowe v. Titus*, 1 Allen, N. B. 326; *Weisse v. Smith*, 6 Am. 621; *Thunder Bay River Booming Co. v. Speechly*, 31 Mich. 336. The Legislature itself, by the statutes 16 Vic. ch. 191, 18 Vic. ch. 84, and the C. S. C. ch. 68, has shewn that it was intended by the term "all streams," in the Statute 12 Vic., to refer to streams upon which improvements might require to be made. The statute ought to be construed in the light of the usage of lumbermen in the driving of logs down streams at the time that the statute was passed. The evidence shews that it was necessary at that time, in the passage of logs down the streams, to form side jambs at places at which obstruc-

tions might exist, as indeed the logs form side jambs of themselves, which would raise the water in the middle of the channel, and enable the logs to be floated through between these side jambs. This was clearly within the purview of the Legislature at the time of the passing the Act 12 Vic., and, if so, the evidence in this case leaves no doubt that all the places upon the stream in question which the plaintiff says were impassable, were floatable within the meaning of the statute. There is abundant evidence to shew that in times of high water logs could be floated over all the places the plaintiff says were impassable, but the plaintiff says that these logs would be so injured in their passage that it would not pay to take them down the stream without improvements, and that therefore the stream is to be regarded as unfloatable; but we contend that if the logs could be taken over, the mere fact that they might be more or less injured is not a fact that the plaintiff could set up for the purpose of shewing that the stream was unfloatable, because it might (depending upon the price of lumber) pay any person to take down logs or timber, even though considerably injured. It is submitted however upon the evidence that timber, or at any rate saw logs, could be floated down with little or no injury beyond that ordinarily received in the passage of logs down streams. A large part of the evidence given by the plaintiff is beside the question which is to be determined here, because that evidence related to the capacity of the stream in question to float square timber; and the evidence shews that, owing to a variety of causes, saw logs can be floated over places so rough as to be impassable for square timber, the latter being more liable to injury in the way of being scratched and having the corners broken than are saw logs, and the case would be stronger in regard to railroad ties. No importance, as a matter of evidence, ought to be attached to the fact of slides having been made at these places which are referred to for the passage of square timber, because the evidence establishes that chutes are now constantly used for the transmission of saw logs which

were thought to be impassable for square timber, and at which slides had been constructed which are still used for square timber: moreover, the fact that all the persons who had constructed dams along the stream in question left openings called "aprons" in their dams for the transmission of logs and timber, is strong evidence to shew that the stream was, at the time that these dams were constructed, floatable for logs, and the plaintiff himself, in constructing dams at a number of places along that stream, has left such openings. The plaintiff contends that the improvements which have been made at the various places along this stream have so changed the character of the stream that it is now impossible to say whether it was floatable in a state of nature; but, if such be the fact, the presumption ought to be against the plaintiff, and that it was so floatable, because the plaintiff ought not now to be allowed to shut up a large stream like the one in question, extending nearly 200 miles into a country containing a great volume of water, except upon clear evidence that it was unfloatable. Under the circumstances of this case the burden was upon the plaintiff of establishing that this was a private stream and not floatable, and he has not established that fact. The plaintiff does not claim to be the owner of the whole of the stream throughout its length, but only claims to own the few lots upon it, which he admits have been acquired by him, no doubt with a view of commanding the stream at these various points. The fact that the plaintiff himself can be stopped by any of the owners of lots along the whole length of the stream, if the plaintiff's contention be correct, seems to establish that the plaintiff's alleged right to this as a private stream cannot be sustained. At most of the places which the plaintiff claims as his property there were reservations or allowances for road on both sides of the stream; and the plaintiff and those under whom he claims have erected dams which have raised the water in such a way as to flood the allowances for road; and the plaintiff, being a wrong-doer in respect

of the said flooding, is not entitled to the assistance of this Court in this cause. The plaintiff has not established any title to the lot upon which the Buck and Stewart dam, referred to in the evidence, has been built, as it appears that the proceedings under the Insolvent Act necessary to vest the title in the plaintiff have not been taken. The Court ought not to have granted an injunction, but at most should have given the plaintiff damages. Even if the stream were not floatable at the points where improvements have been made, it has become so by the making of these improvements and the dedication thereof to the public is complete. The River Mississippi is one of the streams mentioned in both the Consolidated and Revised Statutes respecting the floating of logs and timber, and there is thus a recognition by the Legislature of its navigability and floatability.

E. Blake, Q. C., McCarthy, Q. C., and Creelman, for the respondents. The learned Vice-Chancellor was quite right in rejecting, as he did in fact reject, at the hearing of this cause in the Court below, the evidence tendered on behalf of the appellants for the purpose of shewing that at the time of the passage of the Act 12 Vic. ch. 87, there were no streams in the then Province of Upper Canada down which, during the spring, summer, and autumn freshets, it was possible to float saw logs and other timber, rafts, and crafts, without the aid of improvements in the bed of the stream. Such evidence could not possibly have any bearing upon the questions at issue between the parties to this appeal, and the time occupied in receiving it would have been entirely wasted, so that on this ground alone it was properly rejected. It is a matter of which the Court will take judicial notice that the appellants could not establish in evidence the contention which, according to the statement of their counsel, they had in view in tendering such evidence, it being a matter of public and general knowledge that there were in the then Province of Upper Canada, and that there are now in the Province of Ontario, numerous unimproved

streams down which, during the spring, summer, and autumn freshets, saw logs and other timber are regularly floated, and if the rejected evidence had been received it would have been incumbent upon the learned Vice-Chancellor to receive in rebuttal evidence on the part of the respondent to prove, as he could without difficulty have proved, that there were in the late Province of Upper Canada, and that there are now in the Province of Ontario, hundreds of streams down which, when in a state of nature, saw logs and other timber could easily be driven and have been driven in the ordinary course of log-driving during the season of freshets, so that the reception of all the evidence which the appellants were prepared to give as to the condition of streams in this Province, would not have enabled the Court to determine the construction of the Acts under which the appellants claim to use the streams in question with any greater accuracy or correctness than such construction has already been determined by competent Courts in this province. The learned Vice-Chancellor properly held that a judicial interpretation could be placed upon the Acts in question without hearing the evidence tendered on behalf of the appellants. It would have been impossible for the appellants, within any reasonable limit of time, if at all, to give evidence relating to every stream in this province, as it would have been necessary for them to do in order to establish their position. Our contention is that *prima facie* the term "all streams," as used in the Acts, includes only such streams as in their natural state would during freshets be capable of floating saw logs and other timber down the same, and that such term would not include streams such as those in question in this cause, and which have been rendered serviceable for driving purposes solely by reason of the improvements therein; and the learned Vice-Chancellor was justified in holding that the Acts would have a sufficiently wide scope if limited, as they were in fact limited, in their operation so as not to include the streams in question. The evidence of persons who had not seen the streams in question when in a state

of nature could not be of any weight for the purpose of establishing the fact that such streams were at that time floatable streams, because after the improvements had been made therein it is impossible to form an opinion as to their capacity when in a state of nature; and when, as the fact was in each case of rejected evidence on this ground, it was stated that the witness had not seen the streams in a state of nature, the learned Vice-Chancellor was right in holding that the proper foundation had not been laid for the giving of expert evidence, and that therefore the opinions of such experts were not evidence, and should not be received as such.

The fact that the witnesses called on the part of the respondent to discredit the evidence of the witness Avery did not reside at the then present residence of the said witness, does not render the evidence of such witnesses inadmissible, but simply affects the weight to be attached thereto; and moreover, the conclusion at which the learned Vice-Chancellor arrived upon the whole evidence was quite consistent with a belief in the truth of the evidence of Avery; but it was clearly shewn on the part of the respondent, irrespective of the evidence objected to, and particularly in the cross-examination of Avery, that his evidence was unworthy of belief.

The Attorney-General would not be a proper party to this suit, and the contention on the part of the appellants that he should have been a party, and that the decree pronounced herein is erroneous because it was made in his absence, is not a valid contention, inasmuch as the right which the respondent seeks to have established herein is a private right, namely, the right to be protected in the enjoyment of his own private property, and to have the appellants enjoined from trespassing thereon. The appellants did not establish that in committing the trespass complained of they were exercising a public right, or that the general public had any interest in the matters in question herein; on the contrary, it appeared in evidence that the general public, in the section of country through which

the said streams flow, have long acquiesced in and conceded the right of the respondent to the exclusive use of his improvements on the streams, and the question at issue is simply between one private individual guarding his own property and other private individuals trespassing thereon. If the learned Vice-Chancellor had directed the respondent to amend the record by adding the Attorney-General as a party thereto, he would have prejudged the case, because such direction must have followed from the presumption that the right in question was a public right, in which event the respondent could not have maintained his suit. The evidence given on the part of the respondent, and which was to a great extent corroborated by the evidence given by the appellants' witnesses, established conclusively that the streams in question, particularly where they pass and flow through the lands of the respondent, were not when in a state of nature, even during freshets, navigable or floatable for saw logs and other timber, but that on the contrary their present adaptability for the purpose of log and timber driving has been occasioned solely by reason of the improvements made thereon by the respondent and those through whom he claims; and the contention that chapter 115 of the R. S. O., sec. 1, which is the re-enactment of ch. 48, sec. 15, of the C. S. U. C., which was a re-enactment of the Act 12 Vic. ch. 87, sec. 5, applies to the said streams, is wholly untenable: *Boale v. Dickson*, 13 C. P. 337; *Whelan v. McLachlan*, 16 C. P. 102; *McLaren v. Buck*, 26 C. P. 539. The appellants could only succeed in establishing a right to use the said streams for the purpose of driving their logs without the permission of the owners of the land through which the said streams respectively flow, by shewing that the said streams were navigable or floatable for logs during freshets without the aid of the respondent's improvements, and this they failed to do and could not do. Apart altogether from the Acts above referred to, the streams in question are the private property of the individual who owns the land on each side thereof, and the public have no easement

therein or right to use the same for log driving or other purposes except at the will of such owner: *Angell on Water-courses*, 7th ed., pp. 1, 7, 14, 691, and following pages, and the cases therein cited. The Stat. 12 Vic. ch. 87, was evidently passed for the purpose of applying to streams which, although navigable or floatable in their natural state during seasons of freshets, were not during other seasons of the year, for such streams could not in any sense be said to be public streams, or streams which, prior to the said Act, were open to the public use for the purpose of driving timber or saw logs. The Legislature of the Province of Ontario adopted the construction placed upon sec. 15, of C. S. U. C. ch. 48, in the case of *Boale v. Dickson*, and the other cases, by subsequently re-enacting the said sec. 15 in the same terms, as will be seen by reference to the Act, R. S. O. ch. 115, sec. 1. The streams in question are private streams which are not subject to the public use, because in their natural state they were incapable of being used for floating or driving purposes: *Munson v. Hungerford*, 6 Barb. 265; *Curtis v. Keesler*, 14 Barb. 511; *Wadsworth v. Smith*, 11 Me. 278; *Brown v. Chadbourne*, 31 Me. 9; *Moore v. Sanborne*, 2 Gibbs (Mich.) 519; *Treat v. Lord*, 42 Me. 552; *Morgan v. King*, 35 N. Y. 454 and 459; *American River Water Co. v. Amsden*, 6 Cal. 443; *Rhodes v. Otis*, 33 Alabama 578; *Thunder Bay River Booming Co. v. Speechly*, 31 Mich. 336; *The Montello*, 20 Wall. 430; *Hargraves' Tracts*, *Hale's Treatise*, De Jure Maris, 5 et seq.; *The Daniel Bull*, 10 Wall. 557; *The Commissioner of the Canal Fund v. Kempshall*, 26 Wend. 404; *Hooper v. Hobson*, 57 Me. 273; *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308; *Lorman v. Benson*, 8 Mich. 18; *Rowe v. Titus et al.*, 1 Allen, N. B. 326; *Essen v. McMaster*, 1 Kerr, N. B., 501; *Rameshur Pershad Nerain Singh v. Koonj Behari Pattuk*, L. R. 4 App. 121. It appeared in evidence that the time which, in the ordinary course, is occupied in taking a drive of logs down the stream in question from where the logs of the defendants were lying when the bill of complaint was filed

in the Court below, to that part of the Mississippi which lies further down the stream than the lowest improvement of the respondent, is from three to four months, while no freshet lasts longer than from four to six weeks, which circumstance shews in itself that the said streams are not capable of being used with advantage for driving purposes during the season of freshets. During a portion of the time the appellants and their workmen were committing the trespass of which the respondent complains the freshets had ceased, so that even if the said Act does not apply to the streams in question, the respondent submits that the appellants cannot avail themselves of the protection of the said Acts, which only apply to streams during the spring, summer, and autumn freshets. The evidence does not shew that saw logs can be floated where square timber cannot. On the contrary, it was established that square timber may be more easily driven and require less water to float in than saw logs. The respondent acquired the lands described in the bill of complaint, and purchased and constructed the improvements therein described at great expense, in the belief that he thereby acquired the ownership of the same, with all the rights attaching to such ownership, including the right to prevent trespass thereon. The only place on the said streams on which the respondent has erected improvements where allowances for road have been made on the banks of the stream, is at the foot of Lake Mazinaw, where the improvements known as the Snider improvements are situated. At this place the respondent has regularly acquired the right to use such road allowance as his own, and it was not shewn that he was a wrong-doer in respect thereof, and even there the respondent is the owner of the bed of the stream. The respondent established a sufficient title to the lot upon which the Buck and Stewart dam referred to in the evidence has been built, to enable him to maintain this suit against the appellants, who are mere wrong-doers, professing no title or colour of right. The circumstance that the River Mississippi is one of the rivers named in the Consolidated and

Revised Statutes respecting the floating of logs and timber, is not a recognition by the Legislature of its navigability or floatability. It may fairly be contended that those Acts relate only to that portion of the said river from the High Falls to the Ottawa, the navigability or floatability of which the respondent does not dispute.

July 8, 1881. SPRAGGE, C. J. O.—The plaintiff describes himself in his bill as a lumber merchant, timber dealer, sawmiller, and lumberman, and states that the defendants carries on the same branches of business. The bill enumerates some twelve parcels of land, of which it is stated that the plaintiff is owner; and it states that he is owner also of large tracts of timber. The bill goes on to allege that the streams flowing through his parcels of land were not navigable streams, "nor floatable for logs and timber," while in the crown, nor until after the improvements set forth in the bill were made on the said streams by the plaintiff; and that in their natural and unimproved state they would not, even during freshets, permit of saw-logs or timber being floated down the same, but were useless for the purpose. And in the 10th paragraph the plaintiff thus states his rights: "The plaintiff is entitled, both as riparian proprietor and as owner in fee simple of the bed of the said streams, where they pass and flow through the said lots respectively, to the absolute, exclusive, and uninterrupted user of the said streams for all purposes not forbidden by law, and amongst other purposes, to the absolute and exclusive right to the user of the same for the purpose of floating or driving saw-logs and timber down the same." He then goes on to say that on various parts of the said streams which run and flow through lands therein described, the plaintiff and those through whom he claims have expended a large amount of money in making certain specific and very valuable improvements, which he sets out in a number of the subsequent paragraphs of the bill.

The complaint is, in substance, that the defendants, having got out several thousand saw-logs, threaten and

intend to avail themselves of the improvements set out in the bill; and that in floating and running the timber and logs down the stream they are interfering with and obstructing the plaintiff in floating and running down his timber and saw-logs. And he takes the ground, that the defendants in so doing are wrongfully and forcibly, and without right or colour of right, making use of the improvements made by the plaintiff and those under whom he claims, and of which the plaintiff is entitled to the exclusive and uninterrupted user.

Evidence was given at great length before Proudfoot, V. C. That learned Judge considered that he ought to follow the case of *Boale v. Dickson*, 13 C. P. 337, and stated that he understood that case to determine that if any improvements are necessary to render streams floatable, the statute C. S. U. C. ch. 48, does not apply—that it does not alter the character of the private streams, and that the owner of the land over which the stream flows has the right to prevent intrusion upon it. Upon the evidence, he came to the conclusion that without the artificial means of which evidence was given, neither of the streams upon which improvements had been made by the plaintiff could be considered floatable, even in freshets or high water.

That was the issue upon which the evidence in the cause was given, and that was the proper issue if the construction placed upon the statute in *Boale v. Dickson* was the proper construction.

Upon the appeal to this Court, it is contended that the construction placed upon the statute in *Boale v. Dickson*, was not correct. It becomes our duty, therefore, to consider and determine that question.

It is obvious, from a perusal of the Acts, (which are consolidated in ch. 48 of the C. S. U. C.,) that it was the policy of the legislature to encourage the lumber trade of the province, and to preserve the fish in the streams. The Act of 1828, 9 Geo. IV. ch. 4, recites: "Whereas it is expedient and found necessary to afford facility to the inhabitants of this province engaged in the lumber trade in conveying their rafts to

market, as well as for the ascent of fish, in various streams now obstructed by mill-dams." Then follow two sections, which are embodied in section 3 of the Consolidated Act.

The same policy is evidenced by 12 Vic. ch. 87, the 1st section of which supplies what may be taken to have been an omission in the Act of 1828, viz., that aprons or slides to mill-dams should be so constructed as to afford sufficient depth of water for the passage of saw-logs, lumber, and timber, a provision embodied in section 4 of the Consolidated Act.

Then, in section 5 of the same Act, we find enacted what is embodied in sections 15 and 16 of the Consolidated Act. The first clause of section 5 is in the same terms as section 15, beginning thus,—“And be it enacted that it shall be lawful for all persons to float saw-logs,” (and so to the end of section 15,) “and other timber, rafts, and craft, down all streams in Upper Canada during the spring, summer, and autumn freshets; and that no person shall, by felling trees or placing any other obstruction in or across any such stream, prevent the passage thereof.”

In *Boale v. Dickson* the opinion is expressed, “that this right so given extends only to such streams as in their natural state will, without improvements, during freshets permit saw-logs, timber, &c., to be floated down them; to streams of a different class to those mentioned in the 3rd section, ‘down which lumber is usually brought.’”

No such qualification of the right given by section 15 is to be found in the Act, nor in any of the previous Acts thereby consolidated. There is nothing in the context of any of these Acts shewing or tending to shew that such qualification was intended; and we know, from what we find in the evidence taken in this cause, that confining the right given by section 15 to such streams as are described in the passage I have quoted from *Boale v. Dickson*, would go far to defeat the avowed policy of the Legislature. Evidence was offered that in none of the streams in the province, in their natural state, at the date of the passing of these Acts, could saw-logs, timber, &c., be floated down

without improvements, even during freshets. The evidence was stopped by the learned Vice-Chancellor upon the objection of the plaintiff's counsel after some evidence in that direction had been given. But from the evidence that was given in the cause, it is apparent that if section 15 is to be read with the qualification given to it by *Boale v. Dickson*, a very large number of the streams of the province would be excluded from its operation.

I agree with what is said in *Boale v. Dickson*, that "assuming the plaintiff to be the owner of the bed of the river, and considering this act to be a diminution of private rights, no greater right can arise to the defendant under it than a right to float timber, &c., down during freshets; it confers no right in any way to alter, improve or deepen the natural channel." I do not understand by this that a person to whom such right to float timber, &c., is given, may not remove fallen timber and such like obstacles to navigation as are referred to in *Cull v. Grand Trunk Railway Co.* 10 Gr. 491. But taking what is said in the passage I have just quoted from *Boale v. Dickson*, to be correct, it may all be conceded without affecting the construction of the Act. It may be thought that the Legislature had over-much regard for the interests of lumberers, and too little regard for the interest of riparian proprietors. Our province is to construe the Act, and not to fail to give due effect to it under an idea that its provisions press over hardly upon one class of persons for the benefit of another class. I do not feel pressed by the consideration that no right is conferred upon lumberers "to alter improve or deepen the natural channel." It does not prove that it was not intended to confer upon them the privilege of availing themselves, in the floating of their logs and timber, of improvements found by them to have been already made in the natural channels of the streams. The statutes make no provision for compensation to those at whose expense improvements have been made. We may conceive that it would have been more just that provision should have been made for compensation. The

Legislature may, however, have felt difficulty in the way of adjusting a scale of compensation, or may possibly have taken some such view as this: "The different lumberers make improvements on their respective properties each for his own sake. By giving to all a common right over the property of all, we may make an approximation of doing justice to all. Some may be gainers by this, more than others, but it is the only way of accomplishing that which is with us a paramount object, the fostering of the lumber trade." That this was a paramount object is evidenced by the recitals in the earlier Acts that I have quoted.

Apart from all these considerations, we have the plain unequivocal language of the Act. To adopt the construction put upon it in *Boale v. Dickson*, we must read "all streams," as meaning "some streams," and we look in vain in the Act for any class of streams defined as they are defined in *Boale v. Dickson*. If what is supposed in that case to have been intended by the Legislature had been really intended, section 15 should have run thus: "All persons may float saw-logs and other timber, during the spring, summer, and autumn freshets, down"—not "all streams," but "such streams as in their natural state will, without improvements, permit saw-logs, timber, &c., to be floated down them." Is it too much to say, that such an alteration of the Act is not construction, but legislation? Reference is made in *Boale v. Dickson* "to streams of a different class to those mentioned in the 3rd section, 'down which lumber is usually brought.'" The streams mentioned in the third section, are those down which lumber is usually brought and on which a milldam may be legally erected. That cannot be a stream down which in its natural state, without improvements, timber, &c., could be floated, because on such a stream a milldam could not legally be erected. The words "all streams" could not be applied only to that class of streams. There is another class, denominated "small streams," which certainly did not form the class, though they might be comprehended in the class, to which the words "all streams" applied. I am unable to concur in the construc-

tion put upon section 15 of the Act, in *Boale v. Dickson*. There being no context, nor, indeed, anything whatever in any of the Acts on this subject to control the ordinary grammatical meaning of the words used, we must read them in their ordinary grammatical sense; and should, therefore, construe section 15 as giving the privilege to all persons to float saw-logs and other timber down all streams in Upper Canada during the spring, summer, and autumn freshets.

It follows that, in my judgment, the issue tried before the learned Vice-Chancellor was not an issue that arises under the statute, but that the defendants had and have the right conferred upon them by section 15 of the Act to float during the freshets named in that section their "timber, rafts, and craft" down the streams, down which they were causing them to be floated when their right was called in question by the plaintiff's bill.

We, of course, do not question the propriety of the course taken by the learned Vice-Chancellor in accepting the interpretation put upon the Act in *Boale v. Dickson*; but being unable, after a careful consideration of the several Acts passed upon the subject, to concur in that interpretation, my conclusion is, that the plaintiff's bill must be dismissed.

As to costs. It is stated in Morgan and Davey's book on Costs in the Court of Chancery, p. 76, to be the course of the Court, where a bill is filed on the authority of a case which is over ruled during the progress of the suit, to dismiss the bill without costs; and *Robinson v. Rosher*, 1 Y. & C., Ch., 7, *Sutton Harbour Improvement Co. v. Hitchens*, 1 D. M. & G. 161, and other cases are referred to as instances in which this has been done. In the latter of the two cases that I have referred to, Lord Cranworth said, at p. 169: "We think that the bill was filed upon the authority of existing, much-considered decisions, which were sufficient to warrant the plaintiffs in filing the bill, and so to entitle them, as was held by my learned brother in *Robinson v. Rosher*, to have their bill dismissed without costs."

There can be no doubt, I think, that this bill was filed

upon the authority of *Boale v. Dickson*. That case was decided in 1863. The judgment was prepared by the late Chief Justice Draper, when Chief Justice of the Court of Common Pleas, and was adopted by the judges of that Court upon the appointment of Mr. Draper to the Chief Justiceship of the Court of Queen's Bench. It was, therefore, a decision sufficient, to use the language of Lord Cranworth, to warrant the plaintiff in this suit in filing his bill. If, in the progress of this suit, the decision in *Boale v. Dickson* had been held in some other case not to be a sound interpretation of the statute, ch. 48, the plaintiff in this suit would have been entitled, upon application to the Court of Chancery, to have his bill dismissed out of that Court, without costs. So, also, if at this time there is some other suit pending in that Court which has been instituted upon the authority of *Boale v. Dickson*, the plaintiff in that suit is entitled, if he chooses to apply to it, to have his bill dismissed, without costs. I confess that I have not met with any case where the rule adopted in the cases cited has been applied to a case where the overruling of the previous case has not been in some other case, but in the case itself. This may be accounted for by distinctions or attempted distinctions being taken by the plaintiff himself between his own case and the case overruling the one upon the authority of which his own bill was filed, his contention being that by reason of such distinction the latter was not overruled. On the other hand, I have not met with any case where the rule was held not to apply for the reason that the overruling was in the same and not in another case.

The reason for the rule applies in both cases. In both cases the plaintiff is in strictness, in the wrong in instituting and prosecuting his suit; but he is, nevertheless, excused from paying the defendants' costs. Upon what ground? Upon a ground common to both cases, that the bill was filed upon the authority of a decided case, which was sufficient to warrant the plaintiff in filing his bill. It appears to me that, in reason, it must be so. If the pre-

vious decided case warrants the filing of a bill, it must warrant the prosecution of the suit up to the time that it is overruled, and whether overruled in that or in some other case, can in reason make no difference.

In *Lister v. Leather*, 1 DeG. & J., 361, a plaintiff was allowed to dismiss his bill, without costs, he having been led to the further prosecution of it by the suggestion of a learned Judge before whom it came that he might amend. It turned out that there was an enactment (which was overlooked), which prevented that course being taken; and the plaintiff having been led to take that course by a suggestion from the Court, it was thought reasonable that he should be allowed to dismiss without costs, L. J. Turner, observing that the case fell most strictly within the principle of the decided cases.

The rule or "course of the Court" is, in my judgment, a very reasonable one. A man is warranted in assuming the law to be as he finds it interpreted to be, by a Court whose duty it is to interpret it, and he is perfectly warranted in proceeding to enforce by suit his rights according to the law so interpreted, and I think it a sound exercise of the discretion which is exercised by the Court of Chancery to exempt him from paying to the defendant the costs of a litigation into which he was led by a judicial decision which warranted his suit; therefore, although we may find no case in England exactly parallel to the case before us, yet the principle of the English decisions applies; and we think it at any rate a sound exercise of discretion to exempt the plaintiff in this case from the payment of costs, leaving each party to pay his own costs.

There are, however, some costs which should form an exception to the general costs of the cause, viz: the costs in the Court of Chancery to which the defendants were put by the plaintiff's application for an interlocutory injunction, and the defendants' costs of appeal to this Court from the order granting such interlocutory injunction. So far as the defendants' costs of the cause have been increased by these proceedings they should be paid by the plaintiff to the defendants.

PATTERSON, J. A.—I do not know that I can usefully add anything to what has been said by his Lordship, the Chief Justice, with whom I entirely agree ; but as the question is important, and our opinions differ from those understood to be expressed in *Boale v. Dickson*, 13 C. P. 337, which was properly treated in the Court below as governing the decision there, I venture to state my views in my own words.

A good deal of the argument before us was addressed to the subject of the Common Law definitions of navigable rivers, and many decisions and dicta of English and American Courts, as well as of Courts in this and the sister Provinces, were referred to. I do not propose to attempt an examination of that branch of the law. Interesting as it is, and instructive as the perusal of the authorities unquestionably is, we derive from the study only an indirect assistance in our present task. We are governed, in my opinion, by the direct force of our own legislation. It may be that in the inquiry whether, apart from statutory enactments, one of our streams which never had been navigated, and may be incapable of being navigated by any boat, is yet what at Common Law would be classed as a public highway, we should be within the principle of the English law in admitting, as a test of its navigability, its capacity for the transport of any property, as, *e. g.*, saw-logs or timber, as has been done in some American cases. I do not doubt that in so doing we should not violate the principle on which the English law is founded, but should be only applying the same principle to the circumstances and conditions which, with us, differ from those existing in England. But we are not driven to deduce the rule of law by applying to the circumstances of the country a process of reasoning from principles, which may not always lead different minds to the same conclusion, and which was the course necessarily resorted to in many of the cases cited at the bar. Our Legislature has dealt with the matter, and we have to ascertain as well as we can what is the effect of its declarations.

If we had to consider the general subject of navigable highways, I should be content to refer for all the law on the subject to the very able and exhaustive statement contained in the judgment of Sir James Macaulay in *Regina v. Meyers*, 3 C. P. 305.

The statutes which I think it important to notice are two statutes of Upper Canada, viz.—9 Geo. IV. ch. 4, passed in 1828, and 2 Vic. ch. 16, passed in 1839; and four statutes of the Province of Canada, viz.—7 Vic. ch. 36, passed in 1843; 10 & 11 Vic. ch. 20, passed in 1847; 12 Vic. ch. 87, passed in 1849; and 14 & 15 Vic. ch. 123 passed in 1851. I refer to the original Acts in preference to the same laws in the C. S. U. C. chs. 47 and 48, or in the R. S. O. chs. 113 and 115, although they do not differ in effect, because we get in this way a better idea of the history of the legislation, and can, perhaps, better arrive at what is its proper effect.

The Act of 1828 recited that "it is expedient and found necessary to afford facility to the inhabitants of this Province engaged in the lumber trade in conveying their rafts to market, as well as for the ascent of fish in various streams now obstructed by mill dams for the accommodation of those residing at a distance from the mouths thereof." These last words, which are not very intelligible, but which, in this particular, do not stand alone in these statutes, may serve to warn us against being over-critical in our construction of the language employed.

The Act, in pursuance of the recited object, requires every owner or occupier of a mill dam which is or may be legally erected, or where lumber is usually brought down the stream on which the dam is erected, or where salmon or pickerel abound therein, to construct an apron to his dam of certain specified dimensions and slope.

The only remark I make at present upon this statute is, that it recognizes the right to bring lumber down streams on which mill-dams are legally erected—including, of course, cases where the owner of the dam owns the bed of the stream and both its banks.

The Act of 1839, reciting that much injury has arisen and may continue to arise from the felling of trees into a number of rivers, which are named, including the Mississippi, forbids the cutting and felling of any trees into those rivers or upon such parts of the banks thereof as are usually overflowed in the autumn or spring of the year by means of the rising of the waters of the rivers, unless the branches are lopped off the trees and the trunks cut up into lengths of not more than eighteen feet before they are allowed to be floated or cast into the river; but the Act was not to apply to any round or squared timber or trees, masts, staves, deals, boards, or sawed or manufactured lumber or saw-logs prepared for transportation to a market. I remark here that this Act recognizes as an incident of the lumber trade of the country, the floating down rivers of lumber of all kinds and sizes, from masts to staves, and excepts that employment of the waters from the prohibition which had, under 3 Wm. IV. ch. 28, applied to the river Thames only, but which is by this Act extended to a long list of rivers.

The two Acts next in order of time, viz., those of 1843 and 1847, may be referred to together, as the latter is a re-enactment and extension of the former. They deal with a class of water-courses which includes all the rivers named in the Act of 1839, and others of much smaller size than any of those can be, except near their source. The recital is, that great inconvenience is occasioned by persons throwing slabs, bark, waste stuff, and other refuse of saw-mills, stumps and waste timber, and also leached ashes, into the rivers and rivulets in Upper Canada, and the Act imposes a penalty for every day during which the *obstruction* remains therein, upon—using the words of the later Act—“any person who shall throw into any river rivulet or water-course,—or any owner or occupier of a mill who shall suffer or permit to be thrown, in that part of this province heretofore known as Upper Canada, any slabs, bark, waste-stuff, or other refuse of any saw-mill (except sawdust) or any stumps, roots, shrubs, tanbark, or waste wood or waste wood, timber, or leached ashes,—or any per-

son or persons who shall fell or cause to be felled in or across any such river, rivulet or water-course, any timber or growing or standing tree or trees, and shall allow the same to remain in such river, rivulet or water-course." The penalty is over and above all damages which may arise from the offence, and a proviso is added "that nothing herein contained shall extend or be construed to extend to any dam, weir or bridge erected in or over any such river, rivulet or water-course, or to anything done *bond fide* in the erection or for the purpose of the erection of any such dam, weir or bridge or to any tree cut down or felled across any such river, rivulet, or water-course for the purpose of being used as a means of passage from one side of any such river, rivulet or water-course to the other; provided always further, that such tree shall not be suffered to lie across such river, rivulet or water-course, in such a manner as to impede the flow of water or the *passing of rafts* in the same; provided also, that no obstruction happening without the wilful default of, or in the *bond fide exercise by any party of his rights*, shall occasion to the party any fine or forfeiture, *unless upon default to remove such obstruction* after notice and reasonable time afforded for that purpose."

The comprehensive character of these two statutes is emphasized by the Act of 1851, which was passed to exclude from their operation the river St. Lawrence and the river Ottawa, and any river or rivulet wherein salmon or pickerel or black bass or perch do not abound; an enactment the exact significance of which is not very apparent.

These Acts, particularly that of 1847, again distinctly recognize the right of the lumberer to float timber down streams passing through lands of private owners, and to have obstructions removed, even when placed in or across the stream in the exercise of the rights of the land owner. The expression is, "the passage of rafts," but I take the word "raft" to mean simply timber on its way to market, because timber is not usually formed into a raft on a stream so small as to be crossed upon a single tree thrown across

it by way of a bridge. In another Act *in pari materia*, to which I have yet to refer, the words "rafting or floating down," are apparently used as synonymous. The recognition of the streams as highways which is conveyed by the express allusion to the passing of rafts, is also involved in the right given to recover damages to persons injured by the forbidden "obstructions." All these statutes proceed upon the assumption that the attribute of a highway, for at least the one branch of commerce, attaches to streams of all degrees of size and volume, but in the Act of 1849 this character is set forth in express terms, if I correctly interpret the Act.

The title states that the Act is to amend the Act 9 Geo. IV. ch. 4. The preamble shews the leading object of the Act to be to secure facilities in passing timber down rivers, &c., by reciting that it is necessary to declare that aprons to mill-dams, which are now required by law to be built and maintained by the owners and occupiers thereof in Upper Canada, should be so constructed as to allow a sufficient draft of water to pass over such aprons, as shall be adequate, in the ordinary flow of the streams, to permit saw-logs and other lumber to pass over the same without obstruction. But the Act is not limited to this. The first section casts the duty upon each and every owner and occupier of any mill-dam at which an apron or slide is, by the Act of Geo. IV., required to be constructed, so to have altered and, if not already built, to have constructed such apron or slide so as to afford depth of water sufficient to admit of the passage over such apron or slide of such saw-logs, lumber, and timber *as are usually floated* down such streams or rivers whereon such dams shall be erected; with a proviso permitting waste gates to be constructed and brackets or slash boards to be kept upon the dam till required to be removed for the passage of "such craft, raft, lumber, or saw-logs;" and another proviso "that no person shall be required to build such aprons or slides on small streams, unless required for the purpose of rafting or floating down lumber and saw-logs

as aforesaid." And section five enacts "that it shall be lawful for *all persons* to float saw-logs and other timber, rafts and craft down *all streams* in Upper Canada, during the spring, summer and autumn freshets, and that no person shall, by felling trees or placing any other obstructions in or across such stream, prevent the passage thereof; provided always, that no person using such stream in manner and for the purposes aforesaid, shall alter, injure or destroy any dam or other useful erection in or upon the bed of or across any such stream, or do any *unnecessary damage* thereto, or *on the banks* of such stream; provided there shall be a convenient apron, slides, gate, lock or opening in any such dam or other structure made for the passage of all saw-logs and other timber authorized to be floated down such stream as aforesaid."

These are the provisions which, as presented in C. S. U. C. ch. 48, were in question in *Boale v. Dickson*. The third section of the Consolidated Statute is intended to give the effect of the Act of 1828; sections four, five, and six represent the first section of the Act of 1849—section four containing the direct enactment, and each of the others one of the provisos. And the fifth section of the Act of 1849 is divided between sections 15 and 16 of the Consolidated Act.

In *Boale v. Dickson* the statute was treated as dealing with two classes of streams—one class being streams down which lumber was usually brought, and the other being streams which did not come within that description. Draper, C. J., referring to the provision of section 15 (or section 5 of the Act of 1849), that all persons may float saw-logs, &c., down all streams in Upper Canada during the spring, summer, and autumn freshets, went on to say:—"I am of opinion that this right so given extends only to such streams as in their natural state will, without improvements, during freshets, permit saw-logs, timber, &c., to be floated down them; to streams of a different class to those mentioned in the third section, 'down which lumber is usually brought.'"

This separation of streams into two classes does not appear

to me to be supported by a correct interpretation of the statutes, so far as they deal with streams as highways; and if the classification be, for argument's sake, conceded, I perceive nothing in the statutes to warrant the qualification of the term "all streams," by restricting its meaning to such streams as in their natural state would suffice during freshets for the transport of saw-logs, timber, &c. I suppose the qualification was suggested by a reluctance to extend to such streams any attribute which would not belong to them at common law. The judgment proceeds in these words:—"Assuming the plaintiff to be the owner of the bed of the river, and considering this Act to be a diminution of private rights, no greater right can arise to the defendant under it than a right to float timber, &c., down during freshets; it confers no right in any way to alter, improve, or deepen the natural channel. The protection of the right granted against felling trees into the river or interposing other obstructions cannot, in my view be construed to prevent the erection of a mill-dam, while the necessity of building an apron or slide does not arise according to section six, in small streams unless required for rafting or floating down timber, which again, by the express reference to the third and fourth sections, applies only to streams down which timber is usually brought." I have now quoted the whole of that part of the judgment in which the doctrine is stated on which the plaintiff relies. The concluding portion of my quotation presents a view of the law which I confess seems to me a little paradoxical. I understand it to involve the following propositions:—On streams down which lumber is usually brought, the mill-dams must have aprons, and must have them adjusted so as to permit the passage of such lumber as is usually brought down. On small streams, the dams need not have aprons unless required for floating or rafting timber. But this applies only to the floating or rafting timber in streams down which lumber is usually brought, and on which, therefore, the dams must always have aprons. The fallacy consists, as I conceive, in finding in section 16 of the

Consolidated Statute an express reference or any reference to sections 3 and 4, and is partly owing to the change in the language of the third section from that of the Act of 1828.

I shall, in order to explain my conception of the effect of the Statute, and my reasons for dissenting from the doctrine of *Boale v. Dickson*, resume my consideration of the original Act of 1849, acting upon the rule laid down by Draper, C. J., when presiding in this Court, in *Whelan v. The Queen*, 28 U. C. R. 108, at p. 117, where he said:— "We think that we are, in construction of the Consolidated Statutes, at liberty to refer to the original enactments in order to help us to a right conclusion." The first section imposes a duty in respect of mill dams at which aprons or slides are required, by the Act of 1828, to be constructed. That Statute requires the apron or slide in any one of three cases, viz, when the dam has been legally built, or where lumber is usually brought down the stream, or where salmon or pickerel abound. In the Consolidated Statute this requirement is differently expressed. It is there said: "In case a mill dam be legally erected on any stream, down which stream lumber is usually brought, or in which stream salmon or pickerel abound, the owner or occupier of such dam shall construct," &c., thus reducing the three cases to two. If we give the word "usually" its ordinary force, there will be some difficulty in applying the provisions to any stream, however large, down which lumber had not been brought at the time of the passing of the respective Acts, or before the erection of such dams as happen to be erected after the passing of the Acts; as in those cases it could not be said that lumber was *usually* brought down the streams. I think we should understand a stream down which lumber is said to be usually brought, as meaning a stream actually in use for bringing down lumber, without regard to the frequency of its use before any particular date. It cannot have been intended to refuse in such streams the right to the facilities mentioned, even though the user began at a comparatively late period.

The policy of the law, which was to aid and develop the lumber trade of the country, would extend to them equally with those used before the passing of the Acts. The language used in the Consolidated Statute may, in my opinion, be construed in this way. If not susceptible of that construction when read by itself, it may be so when read in the light of the original Act, where the language, if less precise, is also literally applicable to every dam legally erected. Setting aside the question of salmon and pickerel, we have then, as I understand the Act of 1828, the duty imposed, in respect of mill-dams on all streams used for the passage of lumber, to furnish an apron or slide. The Act of 1849 requires every such apron or slide to be adjusted so as to permit the passage over it of such saw logs, lumber, and timber as are usually floated down the stream. Here the word "usually" has its proper signification. It has no reference to the character of the stream, but defines only the duty with respect to the apron or slide. If the timber usually floated down consists of masts and large timber, preparation for its passage must be made; while if nothing is usually brought down but staves, a passage sufficient for staves is all that is required in the first place. The Act would probably be found elastic enough to require enlarged openings or other appliances whenever timber of a larger size began to come down. Then we have in the proviso respecting *small streams*—which is a rather indefinite classification, as streams must be large or small by comparison, and we are not told what is the dividing line,—a suspension of the duty imposed by the Act of 1828 until aprons or slides become necessary "for the purpose of rafting or floating down lumber and saw-logs as aforesaid."

I think it important to notice that the duty thus suspended is not the duty to *adjust* the apron or slide imposed in terms by this Act of 1849, but the duty to *build* them, which arose under the Act of 1828. Whether this duty was understood to arise under the terms of the first or those of the third of the positions specified in the Act, that is to say,

in the case of every dam legally erected, or because salmon or pickerel may be supposed to have abounded in some small streams, I cannot say; but the proviso clearly assumes the existence of an obligation to construct aprons and slides at dams on small streams, by relieving the owners from that burden until the streams begin to be used for the floating of lumber. These observations, though rather a digression from the direct course of my argument, point to one particular in which, I venture to think, a misconception of the effect of the statutes appears in the judgment in *Boale v. Dickson*.

The effect of the fifth section of the Act of 1849 is, in my judgment, to declare all streams to be public highways for the passage of saw-logs and other timber during the freshets. I find no qualification of the general expression "all streams." I perceive no reason for excluding from its comprehension the streams on which, under section 1, the mill-dams, aprons, and slides must be adjusted to suit the lumber usually sent down them. On the contrary, the provisos which came to form section 16 of the C. S. U. C. ch. 48, but which were part of the original section 1, seem clearly to indicate that no such separation of classes was intended. Those provisos appropriately follow the designation of all streams as public highways, by forbidding *unnecessary* damage to dams or other erections, or to the banks of the stream, so long as facilities are provided for the passage of the "saw-logs and other timber, rafts and craft authorized to be floated down such stream as aforesaid." By the way the first proviso incidentally seems to imply some right to use the banks of the stream, by forbidding doing *unnecessary* damage to them.

In this declaration of section 5 we have, in my opinion, only the explicit assertion of what, as I have attempted to shew, has been from the first assumed by our Legislatures, viz, that for the purposes of the lumber trade of the country all the streams are common and public highways. I do not think it necessary to consider whether that character is attached to them all the year round or only during

the freshets. I assume, for the purpose of the present case, that it is limited to times of freshets, although I might cite the high authority of Sir J. B. Robinson for the opinion that "mentioning spring and autumn freshets was only for the purpose of shewing the intention to be that streams should be clear of obstruction, even though they can only be used for such purposes in times of freshet." *Shipman v. Clothier*, 8 U. C. R. 592.

It may be difficult to form a conception of a highway which cannot be used for travel, and if we confine our notions to such highways as usually form the subject of the doctrines and decisions found in our English books, we may be disposed to say that there can be no highway where one cannot travel. In this country, however, we are familiar with statutory highways—*e. g.*, original allowances for road, which are dedicated by law as highways, and are declared to be common and public highways, and many of which, from the natural character of the ground, are totally impassable. Assuming, therefore, the fact to be as to any particular stream that, in its natural state, it is so obstructed by rocks or rapids or shallows as to be unfitted for the actual conveyance of lumber of any kind, yet, if it is properly called a stream, it comes within the express terms of the statute, and is, to the extent of the statutory declaration, dedicated as a highway. The right to float lumber down all streams, which the statute gives, may be valueless, or only available to a limited extent, by reason of physical obstructions in the way; but that I take to be an accident, which no more affects the legal right than the presence of a perpendicular rock upon an allowance for road derogates from its statutory character as a highway.

If I am correct, as I think I am, in treating this as the legal position of our streams in relation to the business of lumbering, we are freed from the necessity of considering the effect of a grant by the Crown to an individual of the land adjacent to a stream or of the bed of the stream itself, because, as we find it laid down in

Lord Hale's treatise, *de jure maris*, p. 22, the Crown cannot by a grant of the soil destroy the public easement. In this case, if we take the dedication to date no farther back than 1849, it was made while all the land now owned by the plaintiff and mentioned in his bill was vested in the Crown.

Having reached the conclusion that all streams are by public authority dedicated as highways to at least the extent essential to the defence in this action, I have only further to remark that when the natural obstruction which stood in the way of the beneficial enjoyment of the legal right is removed, when the traveller by land or the lumberer seeking to float his lumber down a stream, finds the highway unobstructed, he is at liberty, in my judgment, to make use of it without inquiring by whom, or with what motive, the way has been made practicable. He finds the rock on the road allowance blasted, or the chasm that crossed it bridged, and he pursues his journey along the highway thus improved; or he finds that the freshet covers all obstacles with a sufficient depth of water, and he floats his logs down the highway thus made useful. It may be in appearance, and perhaps in reality, rather hard on the man at whose expense what was a highway only in legal contemplation becomes one fit for profitable use, to have to allow others to share in the advantage without contributing to the cost. That is, however, a matter for his own consideration when he makes the improvements.

We have, and have had ever since 1853, a law under which streams may be improved and made navigable by companies formed for the purpose: 16 Vic. ch. 191; C. S. C. ch. 68. Such companies are authorized to charge tolls for the use of their works. It strikes me as not impossible that an individual in the position of the plaintiff might avail himself of the machinery of this Act to collect the tolls which in his individual capacity he may not have power to enforce. I make this suggestion without reference to the facts of this particular contest, and without intending to surmise that the defendants are unwilling to

pay reasonable charges for the use of the plaintiff's works, or to credit the plaintiff with no motive beyond a desire to secure such reasonable payment.

It was suggested during the argument that one could not reasonably expect the plaintiff to allow others to use his works, even on payment of tolls, because of the difficulty, amounting, as it was urged, to impossibility of computing the just scale of charges. I do not feel myself competent to say how far that suggestion is well founded, or to judge to what extent the plaintiff would be a loser by receiving some payment, even though disproportioned to the benefit paid for, in comparison with having himself to bear the whole cost of works whose duration or usefulness is limited in point of time. But I notice that the Act I am referring to attempts to solve the problem, whether successfully or not I cannot say.

I notice also that, while the Act confers powers on the company necessary for the prosecution of the objects of its incorporation; and while it recognizes rights in persons who have constructed works to render streams navigable, even when they have constructed them on lands of the crown; and while it authorizes the collection of tolls for the use of the works, by persons who use them in bringing their lumber down the stream; and while it clearly authorizes the construction of works to render streams navigable which are not navigable without such artificial aids, it nowhere assumes to confer on lumberers the right to use the streams. It does not declare the streams to be highways, or vest them or their beds in the company; or even make the company owners of the water power created by its dams: C. S. C. 68, sec. 57. It does not give any right to tolls for the use of any part of the stream as such, but only for the use of the works actually used: secs. 62, 65. It is evidently framed upon the same conception of the law as that which I have deduced from my examination of the statutes, viz., that the streams are already highways—perhaps capable of profitable use only after works are constructed, but in the meantime highways down

which persons were always legally entitled to convey their property, though it may not always have been practicable to do so.

For these reasons, which I have probably set forth at unnecessary length, I concur in the conclusion expressed by his Lordship the Chief Justice.

MORRISON, J. A., concurred in the judgments of the Chief Justice and Patterson, J. A.

BURTON, J. A.—In this case I have the misfortune to differ with my learned brothers; and if this had been a Court of last resort, whilst not concurring, I should not have thought it proper to express my dissent; but under the circumstances, I think it but fair to the litigants and respectful to my colleagues briefly to state the grounds on which I feel compelled to come to a different conclusion.

The exposition of the general common law principle applicable to inland waters would seem to be well stated in the case of *Wadsworth v. Smith*, 11 Me. 280, and to be consistent with the doctrine in the tract *de jure maris*, sometimes, but it is said erroneously, attributed to Lord Hale, viz., that those streams which are sufficiently large to bear boats or barges, or to be of public use in the transportation of property, are highways by water, over which the public have a common right, and the private property of the owner of the soil is to be improved in subserviency to the enjoyment of this public right; whilst, on the contrary, such little streams as are not floatable—that is, cannot in their natural state be used for the carriage of boats, rafts, or other property—are wholly and absolutely private, not subject to the servitude of the public interest nor to be regarded as public highways by water, because they are not susceptible of use as a common passage for the public. Numerous decisions are to be found at a very early date in the United States, to the effect that although the adaptation of the stream to such public use may not

be continuous at all seasons, yet the public right attaches and may be exercised whenever opportunities occur.

In the case of *Thunder Bay River Co. v. Speechly*, 31 Mich. 343, Mr. Justice Cooley thus refers to the subject: "Nor is it essential to the easement, that the capacity of the stream as above defined," (that is in its natural state and its ordinary volume of water), "should be continuous, or, in other words, that its ordinary state, at all seasons of the year, should be such as to make it navigable. If it is *ordinarily* subject to periodical fluctuations in the volume and height of its water, attributable to natural causes and recurring as regularly as the seasons, and if its periods of high water and navigable capacity ordinarily continue a sufficient length of time to make it useful as a highway, it is subject to the public easement," referring to *Morgan v. King*, 35 N. Y. 459, 18 Barb. 284, and 30 Barb. 9.

It would seem that this very reasonable view of the Common Law doctrine in reference to these streams had at a very early day been recognized by our own Legislature.

Thus we find in the first Act passed in Upper Canada in reference to mill-dams, 9 Geo. IV. ch. 4, that it was passed in the interest of persons engaged in the lumber trade, to afford facilities for the conveyance of their rafts and lumber to market, and that the owners of mill-dams, erected on the proprietor's own lands, across any stream down which lumber was usually brought, were compelled to make provision for its passage by the construction of sufficient aprons; and in several other Acts before we come to the 12th Vic., provision is made for floating down square timber and other manufactured lumber prepared for market. The latter Act, though passed also evidently in the interest of lumbermen, made provision likewise for the protection of the mill-owner so long as he complied with the conditions prescribed, otherwise the lumberer was at liberty to abate the dam as a nuisance if it interfered with his use of the stream. In the same Act, however, we find the Legislature using language not only

confirmatory of the view that the public had the right to use such streams as I have referred to, but declaring that all persons may, during the spring, summer, and autumn freshets, float saw-logs and other lumber rafts and crafts down all streams, a provision which, in my opinion, was intended to be simply declaratory of the Common Law right of every one to use every stream which was capable, in its natural state and its ordinary volume, of transporting in a condition fit for market the products of the forests or other property, with an express statutory declaration superadded, that it was not essential to the public easement that the capacity of the stream as above defined should be continuous, but that it should be exercisable even though it could only be so exercised in times of freshet.

This was the then state of the law in several of the neighbouring States, where lumbering operations were carried on to a very large extent; but it was not the universal rule there, the Courts in some States holding that a stream which is not capable of being used at any time for the passage of boats or the floating of rafts or logs, except when swelled by rains or the melting of snow, is not, in any legal sense, a navigable stream, but is private property and not subject to the servitude of the public easement. And this being the state of the authorities, it is not unreasonable to assume that our Legislature, dealing with a similar state of things, intended to place the question beyond dispute, and to declare that even though the stream was not navigable at other times, if it became so in times of freshet, the public right to pass at those times should be recognized. If that is not the proper view to take of the enactment, but it was intended to declare these streams to be public highways, as my learned brothers appear to think, it would, I apprehend, follow that whenever the natural obstructions were removed by the owner of the soil, so as to make those portions of the stream not previously navigable passable for boats or timber, the owner of the soil would not be in a position to exclude

the public from the use or enjoyment of the streams so improved. The illustration given by my brother Patterson, of a portion of a concession line which is declared by law to be a common and public highway being impassable by reason of some physical obstruction, would then be applicable. It is because I am unable to find in any of these statutes language declaring these streams to be of that character, that I am unable to concur in the conclusions of the other members of this Court. I quite agree with them in their view of the doctrine laid down in *Boale v. Dickson*, and think there is nothing to warrant the qualified construction placed upon sec. 15 of the 12th Vic. ch. 87, by the learned Judge who delivered the judgment in that case; but I am unable to bring myself to the conclusion that the mere permission or the recognition of the right to float all streams during freshets, make the entire stream "*publici juris*," although, in point of fact, many portions of it may be quite impassable, even in times of freshets, for the smallest description of timber or other article of merchandise.

The language of a statute which would, by a particular construction, have the effect of interfering with the enjoyment of private property, or give rights to others to pass over it without compensation, ought to be very plain to induce a Court to place upon it such an interpretation. I have pointed out what I conceive to be its proper meaning and intention, and full effect is given to the words by adopting that construction. If that be the correct interpretation, then, I apprehend, it will be still necessary to ascertain whether, at the particular point where the stream passes through the plaintiff's land, it was floatable when in a state of nature during freshets. If not, then, in my view, it is not floatable within the meaning of the authorities, but is wholly and absolutely private property.

To illustrate my meaning as to what I conceive would be the effect of the statute if the judgment of my colleagues be correct, let us imagine a stretch of many miles above the place in question, not only floatable but navigable for large

vessels; a space then intervenes for, say half a mile, neither navigable nor floatable at any period of the year, followed by a long stretch of navigable water to the mouth of the stream. It is not necessary to the navigability of a stream that it should be navigable for its entire length. The public may use such parts of it as are navigable. If, then, this intervening space has passed from the Crown into the hands of a private proprietor, and he has at his own charges made what was, previous to the improvement, his own in point of property, and non-navigable and non-floatable, to be passable for large vessels, either by the deepening of the channel or the making of locks, can it be possible that, under language similar to what is to be found in this statute, the owners of steamboats and other large vessels could pass over such property as of right? In other words, that a property which admittedly, whilst it remained unimproved, was strictly private property, unaffected by any public right whatever, lost that character and became *publici juris*, although made navigable entirely at his own and not the public expense, because in an Act of Parliament it is declared that all persons may, during the spring, summer and autumn freshets, float saw-logs, &c., down all streams? I venture with considerable diffidence and doubt in the correctness of my own opinion, in consequence of the different view taken by my brothers, to think that such a result could never have been contemplated by the Legislature. Yet such must be the result in the case suggested if the proper construction of this Act gives the defendants the power to float timber over these improvements of the plaintiff as of right.

I repeat then that in my view of the statute it was intended to confer no new right, but to remove all doubts as to the right of lumberers to use a stream passing through private lands, even though not passable at ordinary times, if it could be made useful at a time of freshet.

If that be the proper construction of the section, then it would be necessary to examine the evidence for the purpose of ascertaining whether, at the particular points where

the stream passes through the plaintiff's land, it was a floatable stream before the improvements ; but as the other members of the Court take a different view of the statute, it becomes unnecessary for me to do so.

Upon the other appeal, from the judgment of Ferguson, V. C. (a), it becomes unnecessary to offer any opinion, except with a view to the costs. I may say, therefore, that to my mind, section 27 of the Appeal Act can have no application to a case of this description. There can be no *execution* of a decree necessary or possible in a case where the decree is, if I may use the term, *executed* as soon as made. There was nothing further to be done under it, and nothing further would require to be done unless it were disobeyed, in which case I apprehend that, without the formal issue of a writ of injunction, the parties to the suit so disobeying could be proceeded against for contempt. I think, therefore, that that appeal should be dismissed, with costs.

In the main appeal, I am pleased to find that the other members of the Court have seen their way to the allowance of the appeal, as a contrary conclusion could not have been otherwise than disastrous to one of the most important industries in the Dominion. The result is, that the public become entitled to use the plaintiff's improvements without compensation, which was most properly secured to him under the Act which has recently been disallowed.

Appeal allowed. (b)

(a) This was an appeal from the judgment of Ferguson, V. C., discharging an application of the defendants to stay the injunction pending the appeal ; but in consequence of the main appeal being allowed, judgment on this appeal became unnecessary.

(b) This case has since been argued in the Supreme Court, and stands for judgment.

ANDREW V. STUART ET AL.

Assignment for creditors—Revocable deed—Preference—R. S. O. ch. 118, sec. 2—Surprise.

B., an insolvent debtor, made a deed of his stock-in-trade and lands to the plaintiff in trust, to convert the same into money, pay the expenses of the trust, retain ten per cent. of moneys received by way of compensation, and pay the present execution and other privileged creditors, if any, according to priority, next to divide the balance *pari passu* amongst all other creditors, and to pay the surplus, if any, to B. The plaintiff took possession under the deed. The trustee was not a creditor, and there was no evidence of any acceptance of the deed by, or communication of it, to any of the creditors. The defendants seized under an execution a few days after the deed.

Held, affirming the judgment of the County Judge of Halton, that the deed was a revocable, voluntary instrument, the relation of trustee and *cestui que trust* not having been established between the plaintiff and the creditors, and therefore void as against the defendants.

Held, also, that it was void under R. S. O. ch. 118, sec. 2, as it did not provide for the paying ratably and proportionably, and without preference or priority all the creditors, but gave a preference to others besides execution creditors.

Held, also, that the abstaining of a party from proof under the idea that the opposite party has no real intention of putting him to such proof, and being thereby taken by surprise, is not ground for granting a new trial.

THIS was an appeal from the judgment of the County Judge of the County of Halton.

The action was an interpleader issue tried before the County Judge without a jury.

The plaintiff was the assignee of one R. D. Bigger of certain goods, furniture, and lands under a deed of assignment. The defendants were execution creditors of Bigger.

The evidence, so far as material, is set out in the judgments of Spragge, C. J. O., and Patterson, J. A.

A verdict was entered for the plaintiff by consent, with leave to the defendants to move to enter it in their favour.

In the following term a rule *nisi* was obtained pursuant to the leave reserved, and to the C. L. P. Act, to enter a verdict for the defendants, on the grounds that it did not appear that the deed of assignment was executed or assented to by any creditor of the said R. D. Bigger before the

sheriff seized the said goods under the said execution, or that the plaintiff was a creditor of the said R. D. Bigger, or that the relation of trustee and *cestui que trust* was created before the said seizure, and that the said deed of assignment was therefore fraudulent and void as against creditors.

The rule was subsequently argued and judgment delivered by the learned County Court Judge, making the rule absolute to enter the verdict for the defendants.

From this judgment the plaintiff appealed.

On September 6th, 1881, the appeal was argued. (a)

John A. Patterson, for the appellant. The question is whether the trust is irrevocable or not, and that depends upon whether the assignee is bound to distribute the estate and compellable to do so by the creditors. He is so bound, because Hill & Co., creditors of his assignor, communicated with him, and he registered the deed in full, with all its trusts. The deed was not withheld by the debtor, but general notice given to the world. Notice to creditors is sufficient without express assent. Assent will be presumed from forbearance: *Goodeve v. Manners*, 5 Gr. 114. There the rules laid down in the English cases as to express assent by creditors were much relaxed by Spragge, V.C. See also *Wilding v. Richards*, 1 Coll. 659; *Kirwan v. Daniel*, 5 Hare 500; *Actin v. Woodgate*, 2 M. & K. 492. This objection is not open to the defendants after verdict, as it was not taken at the trial. The affidavit of *bona fides* is annexed to the deed and not disputed. A deed made by Bigger to the assignee as a mere mandatory for Bigger's convenience could not be *bond fide*. The defendants consented to the verdict, and thereby admitted all material facts, and the only objection then open thereafter was as to the form of the deed. The plaintiff could have supplied at the trial complete proof of the irrevocability of the deed, and the Judge of the Court below should have received affi-

(a) *Present*—SPRAGGE, C. J. O. ; BURTON, PATTERSON and MORRISON, JJ. A.

davits to that effect, and ordered a new trial. As to the objection taken by the defendants as to the 10 per cent. commission payable to the assignee, see *Webb v. Earl of Shaftesbury*, 7 Ves. 480; *Willis v. Kibble*, 1 Beav. 559; *Medcalf v. Keefer*, 8 Gr. 392, 395. As to the objection that the deed directs the book accounts, &c., to be distributed subject to priority of execution, this case is distinguishable from *Watts v. Howell*, 21 U. C. R. 255, as no intention is expressed by the assignor to distribute without preference. Again, if Bigger is not insolvent the last two objections cannot prevail, and there was no evidence given that Bigger was insolvent, and the deed of assignment contains no recital or admission that he was insolvent.

Alexander Bruce, for the respondents. The deed in question is revocable. The relation of trustee and *cestuis que trust* is not created. The assignee is not a creditor, and no creditor executes the deed: *Siggers v. Evans*, 5 E. & B. 367; *Maulson v. Tapping*, 17 U. C. R. 183. The defendants consenting to a verdict does not preclude them from raising objections in term. They were not bound to point out defects in the plaintiff's proof. The commission payable to the assignee destroys that want of preference or priority necessary to support the deed. By the form of the deed the execution creditors, who may not have a lien on the goods, have priority, *e. g.* creditors who may have sued out execution, but not delivered the same to the sheriff of the county where the goods were. Again, under *Watts v. Howell*, 21 U. C. R. 255, choses in action cannot be assigned so that execution creditors shall have preference and priority, as they have none such by virtue of their execution. The deed in question is against the R. S. O. ch. 118, in this respect, if no other. The affidavits put in by the plaintiff in term should not have been received by the Judge of the Court below, and, even if true and uncontradicted, they do not prove enough to establish the relation of trustee and *cestuis que trust* between the plaintiff and Bigger's creditors.

J. H. Patterson, in reply.

November 28, 1881. SPRAGGE, C. J. O.—This was an interpleader issue tried without a jury, before the County Court Judge of the county of Halton, the plaintiff being the assignee of one Bigger, of certain goods, furniture, and lands, and the defendants execution creditors of Bigger; and the short question is, whether the assignment is a deed of agency or management, in which case it would be revocable by Bigger, and the property conveyed his property, upon which the defendants' execution would operate, or a deed of trust of which the creditors of Bigger would be *cestuis que trust*.

The facts before the learned Judge at the trial, were shortly these. The assignment bears date 3rd March, 1881. It recites that Bigger is possessed of the stock-in-trade, book debts, goods, chattels, rights, credits, and effects hereinafter set forth and enumerated, and hath contracted with the said party of the second part, "the plaintiff," for the sale to him of the same upon the trusts hereinafter mentioned." And that the said Bigger "is desirous of applying the said property in payment of his said debts, and for the purpose of having the said property converted into money and divided ratably and proportionably amongst the said creditors, without preference or priority, in satisfaction *pro tanto* of their said respective claims." The subject of assignment is a stock-in-trade, in and about a shop and premises, and certain land in the town of Oakville, and generally all his property; and the trust is to convert the same into money; in the first place to pay the expenses of the trust; secondly, to retain ten per cent. of moneys received by way of compensation; in the next place, to pay the present execution and other privileged creditors, if any, according to priority, and in such amounts as they might agree to receive; next, to divide the balance *pari passu* among all other creditors; and to pay the surplus, if any, to Bigger himself. The instrument was filed in the County Court office on the 7th of March. The defendants' judgment was recovered 12th March, execution received by the sheriff 14th March,

and the goods in question seized by sheriff 31st March, 1881.

A letter is put in from the defendants to Bigger of a date before the execution of the assignment:—

"HAMILTON, Canada, 22nd February, 1881.

"MR. R. D. BIGGER,

"Oakville.

"DEAR SIR,—We have been informed by Mr. Scott that he left a writ, at our instance, with you yesterday. Special arrangements have been made to keep the issue of this writ from the knowledge of the Mercantile Agencies, so that your credit will not be affected in the slightest by it. We did not know that the proceedings which have been taken would be necessary, but we are advised that they were. However, we are so anxious to avoid the appearance of harsh dealing that if you will make us a payment on account next Saturday, and will continue to make small payments on account from time to time, we will not so long as these payments are satisfactory, unless forced by the action of other creditors, instruct the sheriff to interfere with you. We hope that you will not blame us for the course that we have taken; and we trust that you will continue as usual, and that you may be able to pull through. Mr. Scott says that you spoke about giving us some security on terms of fresh advances of goods being made. Please let us know at your earliest convenience what you wish to do in this respect, and oblige,

"Very truly yours,

"STUART & MACPHERSON."

Also a letter from other creditors, Hill, McIntosh, and Innes, which is dated the day after the assignment:—

"TORONTO, 4th March, 1881.

"MR. R. D. BIGGER,

"Oakville.

"DEAR SIR,—We notice that Messrs. Stuart & Macpherson have issued a writ against you in the County Court. We would like to hear from you by return mail, with an explanation of this. It is not fair to your other creditors to allow them to seize your goods, and if you are in any trouble you should at once consult with your creditors; but before doing so make an assignment in trust so that all would share alike. We trust such a course will not be necessary, and that we will hear from you with a satisfactory explanation at once.

"Yours truly, .

"HILL, MCINTOSH & INNES."

The parol evidence was that of the assignee. He says that he went into possession first of the store goods, and afterwards of the furniture; and that with the assistance

of Bigger he took stock of the goods. This was all the evidence.

The assignment, looking at its recitals and what it purports to convey, reads like a document intended to transfer to a trustee all a debtor's property (excepting that exempted from execution) for the benefit of creditors, but the question is whether, assuming that to be the debtor's intention, he was not at liberty to alter his intention and revoke it. No creditor was a party to it. The assignee was not himself a creditor, and it was not shewn that it was communicated to any creditor, or even that any creditor to whom the knowledge of its existence might have come, forbore by reason of it to press his claim.

In *Siggers v. Evans*, 5 E. & B. 367, 378, Lord Campbell reviewed the previously decided cases, and held the rule established by them to be that "where a person does, without the privity of any one, without receiving consideration, and without notice to any creditor, himself make a disposition as between himself and trustees, for the payment of his debts, he is merely directing the mode in which his own property shall be applied for his own benefit ; and that the general creditors, or the creditors named in the schedule, are merely persons named there for the purpose of shewing how the trust property under the voluntary deed shall be applied for the benefit of the volunteers." And he adds "Sir John Leach speaks of the rule as shewing that, where the conveyance is not communicated to the creditors, and they are not in any way privy to the conveyance, it has merely the same effect as if the debtor had delivered money to an agent to pay his creditors, in which case he might, before payment or communication by the agent to the creditors, have recalled the money so delivered. And the Judges of this Court, in *Harland v. Binks*, 15 Q. B. 713, treat the rule as depending on the principle of the right of the assignor to revoke, whilst the money is in the hands of an agent, according to the case of *Williams v. Everett*, 14 East 582, and other cases of the same description. It is too late now to consider how far the principle of the right

to revoke the authority of an agent was properly applicable at law to a case where a legal interest was intended to pass under the deed. In equity, where the real intention of the transaction is looked at, it has long been established that, the object being that the party shall distribute as agent, the principal may revoke till the agent has bound himself to the creditor: and Courts of law have followed the decisions of the Courts of equity in this respect."

The Court held the case before it to be not within the rule established by the cases cited, by the circumstance that the trustee was himself a creditor of the creator of the trust: that the trustee's debt was a consideration, and that he took an assignment coupled with an interest, and which therefore was not revocable.

Goodeve v. Manners, 5 Gr. 114, 120, a leading case in the Court of Chancery of this Province, was decided before *Siggers v. Evans*, 5 E. & B. 367. It does not at any rate help the plaintiff in this case, as it appeared very clearly that the assignment and its objects were intended to be communicated, and were communicated to the creditors of the creator of the trust.

I have examined the cases subsequent to *Siggers v. Evans*, 5 E. & B. 367, as well as the previous cases to which we have been referred. Some of them certainly manifest a disinclination to extend at all the doctrine under which assignments purporting to be in trust to pay creditors have been held revocable, but in none of them has such a deed as the one in this case, and under the circumstances proved in this case, been held to be a deed in which creditors have been held entitled to the position of *cestuis que trust*.

It is unnecessary to consider whether the Fraudulent Preference Act, R. S. O. ch. 118, makes any difference in the law upon this point, because the assignment made in this case is not such an assignment as is excepted from being impeachable under the Act, inasmuch as it does not provide for the paying and satisfying ratably and proportionably, and without preference or priority, all the creditors of the debtor, but gives a preference to some

classes—to a class besides execution creditors, a preference of whom, would probably not be objectionable, because of their being entitled to it by their executions.

In *Watts v. Howell*, 21 U. C. R. 255, an assignment was held not to come under the statute, because of preferences given to some classes of creditors.

The assignment authorizing the trustee to retain ten per cent. out of moneys collected, is also objected to, as making the deed one outside of the exception in the statute. A like provision was one of those held to avoid the deed in *Cornwall v. Gault*, 23 U. C. R. 46. I do not say, however, because it is unnecessary to say, that that al. ne. (though one-tenth of the estate does seem an excessive proportion for the management and disposition of it) would suffice to avoid the deed. All that is necessary to say is, that this deed cannot be set up as a good deed under ch. 118.

It remains to consider whether the learned Judge was wrong in refusing to receive the affidavits of two creditors, and of the solicitors of the plaintiff, which were offered in Term, and so after the trial, in order to prove facts in relation to the deed of assignment which they conceive would bring it within those cases in which communication to creditors, and the forbearance of creditors to sue by reason of the assignment, have been held to make the deed not revocable and the creditors *cestuis que trust*.

At the trial a verdict was entered for the plaintiff by consent, with leave to the defendants to move to enter a verdict for the defendants. The defendants accordingly moved in Term, and upon the return of the rule *nisi* the plaintiff offered these affidavits. The question before the Court was, which of the parties to the interpleader suit was entitled to the goods claimed by them respectively; a question to be decided upon the evidence given at the trial. It would have been contrary to all rule to admit affidavits in proof of facts necessary to the plaintiffs' title; and yet, so far as appears, that is what the plaintiff offered to do. It does not appear that he applied for a new trial on the ground of surprise, or of the discovery of new

evidence, or upon any other ground, nor does he make now any case upon either of the grounds that I have suggested. It is not "surprise" in the proper meaning of the term that a party considers his case proved, and does not expect his adversary to point out that certain facts essential to his case are wanting; and he does not even allege that the facts disclosed in the affidavits offered by him in evidence, were not known to him at the trial. If, therefore, he had made a substantive application for a new trial, which he did not do, it would, I think, have been properly refused.

The plaintiff cites no case in support of what he applied for, and the cases, even if the application had been for a new trial, are against him. The case most resembling this that I have seen, is that of *Prout v. Pollard*, 1 U. C. R. 170, which is correctly summarized in the head note thus: "Where in an action on a promissory note by payee against maker, the defendant places upon the record special matter * * and obtains a verdict, the Court will not grant a new trial on an affidavit by the plaintiff, that he had no idea that the defendant really intended to set up such a defence; but supposed that it was pleaded merely to gain time, and therefore did not prepare to meet it; and likewise of his ability to meet such defence on another trial."

The difference between the cases is, that in an interpleader suit there is no special pleading, but, when it is remembered how much it has been the practice to plead special pleas only to gain time, without any idea of supporting them by evidence, the difference between the cases is but trifling; the important point, and in which they agree, is that the abstaining by a party from proof under an idea that his adversary had no real intention of putting him to such proof, and being thereby taken by surprise, is not a ground for granting a new trial; although the plaintiff makes affidavit as to the surprise, and swears that he will be able on another trial to meet the case made by his adversary.

It is impossible for us to say that the learned Judge

was wrong in refusing to receive the affidavits for the purpose for which they were offered, or that he would have been wrong in refusing a new trial if they had been made the ground of an application for that purpose.

The appeal is disallowed, with costs.

BURTON, J. A.—I agree in thinking that this appeal should be dismissed.

The effect of the arrangement made at *nisi prius* was, I think, to concede that all the evidence which either party desired to give was before the Court, and that they were prepared to stake their case or defence upon the material facts so proved or admitted, and I am more convinced of this from the first reason of appeal which appears on the printed book, which is in these words:

1. Because the evidence given at the trial sufficiently establishes the facts, if it be necessary so to do, first, that the said deed of assignment was assented to by a creditor or creditors of the said Bigger; and second, that the relationship of trustee and *cestui que trust* was created between the plaintiff and a creditor or creditors of said Bigger before the seizure of the said goods.

It is to my mind in effect the same as if the parties had stated a case for the opinion of the Court.

It may not be a very satisfactory way of disposing of the question, as if upon the closing of the claimant's case the defendants had submitted that there was no legal evidence in support of the affirmative of the issue (for in strictness I apprehend, notwithstanding some dicta to the contrary, there cannot be a nonsuit on an issue of this kind directed to inform the conscience of the Court upon the specific question of fact sent down for trial), it might have been in the claimant's power to give additional evidence to make out that the relationship of trustee and *cestuis que trust* had been established between him and some of the creditors.

It was of course open to him to apply to be relieved against the consequence of his mistake, and I think the affidavits might have been looked at with that view,

although contrary to the usual rule that affidavits are not receivable when none are filed on the other side upon applying for the rule *nisi*. It is in fact a substantive application to be relieved from his own mistake, but it is at least questionable whether those affidavits, which I assume present the case as strongly as it can be made for the claimant, would have established the position upon which the claim is attempted to be supported.

Mr. Warren is very economical with his facts when dealing with dates, and merely discloses that after the assignment, and after he had obtained judgment, he discontinued proceedings, which for aught that appears may have been after the seizure; and Mr. Fitch is almost equally reticent upon the point, which in a case of this nature was all material. He does indeed admit that he heard of the defendants' suit, and advised an assignment, but whether he would have approved of this assignment is not shewn; nor does he shew when the assignment was communicated to him; and his forbearing to sue appears of very little consequence, as he could not have obtained judgment in priority to the defendants.

But it is not necessary to consider whether this would or would not have been sufficient on a new trial to sustain the plaintiff's position, because I am clear that on the decided cases this assignment could not stand against the other objections which have been urged to and are apparent on its face, and that the evidence was sufficient to shew that the assignor was an insolvent within the meaning of the Act, R. S. O. ch. 118. See *Watts v. Howell*, 21 U. C. R. 255; *Hendry v. Harty*, 9 C. P. 520; *Cornwall v. Gault*, 23 U. C. R. 46, which, with many other reported cases, establish that even though the assignment be made *bond fide*, the debtor has no right to dictate to his creditors the terms upon which they are to take it, either in the matter of the remuneration of the assignee, or the privilege of certain creditors.

I am therefore of opinion that the judgment should be affirmed, and this appeal dismissed, with costs.

PATTERSON, J. A.—The plaintiff in this interpleader is the assignee of one Bigger, under a deed of assignment dated 3rd March, 1881, made for the benefit of the creditors of Bigger.

The defendants are execution creditors of Bigger. The deed recites that Bigger is indebted to the several persons and firms thereafter particularly named and otherwise designated in the annexed schedule; that he is possessed of the effects thereafter set forth and enumerated, and hath contracted with Andrew for the sale to him of the same upon the trusts thereafter mentioned; and that he is desirous of applying the property in payment of his said debts; and for the purpose of having it converted into money, and divided ratably and proportionably amongst the said creditors without preference or priority, in satisfaction *pro tanto* of their respective claims, he assigns personal effects and real estate upon trust to convert the whole into money, and to dispose of the money *first* in paying expenses: *secondly*, by retaining ten per cent. on all moneys received in the execution of the trust as his own remuneration: *thirdly*, in paying the debts of the present execution and other privileged creditors, if any, of Bigger, according to the priorities thereof, and in such amounts as they may respectively agree to receive: *fourthly*, in paying and dividing the balance to and among all other the creditors of Bigger *pari passu* ratably and proportionably to the amount of their debts respectively, without any preference or priority, to the full amount of their debts and interest, if the said balance shall so far extend; and *lastly*, to pay the surplus, if any, to Bigger. The schedule contains the names of eighteen individuals or firms as creditors, including the defendants and the firm of Hill, McIntosh, and Innes, and not including the assignee himself. The deed was duly filed in the County Court office, with a proper affidavit of *bona fides* made by the assignee.

At the trial before the learned Judge of the county Court without a jury, the defendants admitted certain facts, viz., the execution of the deed; its filing in the county

Court office ; that the affidavits on the deed produced were also on the one filed ; the identity of the goods seized with some of those mentioned in the deed ; and the genuineness of two letters produced by the plaintiff. And the plaintiff admitted the judgment upon which execution issued on the 12th March, 1881, and was received by the sheriff 13th March, 1881, and the seizure under it, on 31st March, 1881, of the goods in question.

The letters put in were the following :

[The learned Judge then read the letters set out on p. 499.]

The plaintiff gave evidence for the purpose of shewing that he had promptly taken possession of the goods.

No other evidence was given.

A verdict was entered for the plaintiff by consent, with leave to the defendants to move to enter a verdict for them.

In the following term the defendants obtained a rule *nisi*, which set out several grounds of objection to the validity of the deed as against them. The first objection was, that the relation of trustee and *cestuis que trust* had not been shewn to have been created before the seizure, by the execution of or assent to the deed, by any creditor of Bigger.

That objection was sustained by the learned Judge. His written judgment deals with it alone, and proceeds upon the ground, not that no creditor had assented, but upon the ground that no assent had been proved.

The other objections were not addressed to questions of evidence, but attacked the deed as insufficient in law ; yet, by a strange misconception of the character of the contest, the plaintiff, in preparing the appeal book, has entirely omitted them, giving only the first one as an extract from the rule *nisi*, and alleging that it alone is material to this appeal. The others have, however, been brought to our notice by the respondents, and have been argued. These objections are founded upon R. S. O. ch. 118, sec. 2, which declares that in case any person being at the time in insolvent circumstances, or unable to pay his debts in full,

or knowing himself to be on the eve of insolvency, makes or causes to be made any gift, conveyance, assignment, &c., with intent to defeat or delay the creditors of such person, or with intent to give one or more of the creditors of such person a preference over his other creditors, or over one or more of such creditors, every such gift, &c., shall be null and void as against the creditors of such person; but nothing herein contained shall invalidate or make void any deed of assignment made and executed by any debtor for the purpose of paying and satisfying ratably and proportionably, and without preference or priority, all the creditors of such debtor their just debts; and nothing herein contained shall invalidate or make void any *bona fide* sale of goods in the ordinary course of trade or calling to innocent purchasers.

This deed, which awards to the assignee ten per cent. of the whole effects realized, and which postpones the general creditors to those who are called "the present execution and other privileged creditors if any," cannot be said to come within the first exception. The commission of ten per cent. over and above all expenses of executing the trust is arbitrarily fixed without any reference to the reasonableness of the allowance: and the term "execution and other privileged creditors," whatever class it may be intended to denote, is clearly capable of including creditors who had not at the date of the deed taken property in execution, or otherwise acquired a lien or charge upon it; and who, if any such there were, could not have been deprived of their priority by any conveyance made by their debtor. Besides this, these privileged creditors are given the right to be paid out of all the effects assigned, which include book debts which were not liable to seizure under execution.

The rules governing the application of this statute have been settled by decisions extending back over so many years, and so familiar to practitioners, particularly to those who were conversant with the litigation occasioned by assignments similar to that before us, between the expira-

tion of the Bankrupt Act of 1843, and the passing of the Insolvent Act of 1864, that it is unnecessary to refer in detail to the cases, several of which have been cited to us.

Upon the principles settled by those decisions we must hold this assignment invalid as against the creditors of Bigger, if the fact has been established that when he made it he was in insolvent circumstances, or unable to pay his debts in full, or knew himself to be on the eve of insolvency. There has been no finding of fact in the Court below upon this or any other point. If necessary for us now to find the fact upon the evidence, I should say without hesitation that the plaintiff had furnished ample evidence of it, and has indeed put it beyond question, by producing, in support of the assignment, the two letters, particularly that of Hill, McIntosh, and Innes, in which the insolvency of Bigger is pointed to as a reason why he should make an assignment; and by the inference which the plaintiff intends to be drawn, and which it is proper to draw, that the assignment was made in consequence of the embarrassments to which the letters allude.

In my opinion the appeal should be disposed of and the decision of the Court below affirmed upon this ground, namely, the invalidity of the assignment under our statute.

I prefer not to discuss at any length the ground upon which the judgment proceeded, as noted in the remarks of the learned Judge.

It is scarcely necessary to say that I do not question the rule of law on which he acted, which requires the assent of some creditor before the relation of trustee and *cestui qui trust* is established so as to deprive the assignment of the character of a voluntary and revocable instrument. I may also say that I agree with the learned Judge in failing to find any direct evidence of such assent. But while saying this much I do not say there is no evidence from which such assent might be deduced. I form no decided opinion as to that. But I have a very strong feeling that all these matters of fact—the existence of Bigger's insolvency, or inability to pay his debts in full, or his knowledge that

insolvency was impending, and the assent of creditors to the assignment, were covered and conceded in the consent to the entry of a verdict for the plaintiff. No question was made as to any of these matters when the case was before the tribunal at which all questions of fact should have been decided, and before which further evidence might have been adduced if it had been contended that any essential fact remained in dispute. If the assent of the creditors or some of them had been really disputed, and the absence of evidence of such consent relied on as an objection to the plaintiff's recovery, the proper course would have been to move for a nonsuit, and if the evidence had not then been supplied, and if leave had been reserved to move, it would properly have been to move for a nonsuit, and not for a verdict for the defendants, the entry of which would assume the fact that no consent had been given—a fact which was neither proved nor admitted. The course taken on the part of the defendants in consenting to a verdict for the plaintiff, and then insisting for the first time, in term, upon mere absence of evidence, as ground for entering a verdict for them upon the leave reserved, was, to say the least, unusual.

In my judgment the learned Judge ought to have dealt differently with the matter.

If he had reason to believe that the objection was taken in term against good faith, he should have held the defendants to the effect of their consent as a concession of all material facts. But if it appeared to him that there was a *bonâ fide* dispute as to the fact, and that the consent had been given inadvertently, or in momentary forgetfulness of the necessity for the assent of the creditors, and not by way of a trap to be sprung upon the plaintiff when too late to supply the defect, his proper course would, I think, have been to receive the evidence, ordering, if necessary for that purpose, a new trial. Had any strong reason appeared against according that relief, a nonsuit might have been entered, notwithstanding that the issue was one under the Interpleader Act: *Barnes v. Headley*, 1 Camp.

157, 163; *Bryson v. Clandinan*, 7 U. C. R. 198; but I cannot see that the conclusive step of entering a verdict for the defendants was at all called for.

Differing, as I thus do, from the learned Judge of the Court below, upon the grounds on which his decision was based, I agree that upon the other objection the assignment cannot be supported, and that we must dismiss the appeal. I agree also that we must follow our general rule and dismiss it with costs, because although the appellant should in my judgment succeed upon the immediate ground advanced by him as the reason of his appeal, it was his duty to have set out all the objections taken in the rule to his recovery, and to have been prepared to maintain his verdict as against them all.

MORRISON, J. A., concurred.

Appeal dismissed.

LOWSON ET AL. V. THE CANADA FARMERS' MUTUAL
FIRE INSURANCE COMPANY.

Mutual insurance—Proprietary or mutual policy—Further insurance.

The defendants were authorized by their charter to carry on both proprietary and mutual insurance business; but they were debarred from taking risks which were extra-hazardous in the mutual branch. The plaintiffs' property falling within the prohibited class, was insured with the defendants by a policy which was not on its face a mutual one, but an absolute undertaking to pay the loss, but instead of making a cash payment they gave a premium note upon which they paid several assessments. The application also was headed "Premium Note System."

Held, reversing the judgment of the Court of Chancery, 28 Gr. 525, that the policy was not a mutual one, there being nothing except the premium note, which was not conclusive, to indicate that it was a mutual insurance, and the property being of such a nature that it could not be insured in the mutual branch.

Quære, per CAMERON, J., whether the risk was sufficiently shewn to be one which defendants could not insure in their mutual branch.

Held, also, following *Parsons v. Standard Ins. Co.*, 5 Sup. Ct. R. 233, that a change in the company in which another insurance has been effected, not increasing the amount insured, did not avoid the policy.

THIS was an appeal from the judgment of the Court of Chancery reported in 28 Gr. 525, where the facts are fully stated.

The following were the appellants' reasons for appeal:

1. The evidence established a just debt, which the defendant the Insurance Company would have been ordered to pay to the plaintiffs if the learned Chancellor who heard the case had not considered the policy in question to have been entered into as a policy of mutual insurance, and so prohibited by the provisions of the 16th section of the Act, 14 & 15 Vic. ch. 168.

2. Instead of this policy expressing in any of its terms that it was one of "Mutual Insurance," with a mutual member of the company, the contract thereby evidenced purports to be one of general insurance, and upon property of a nature which could not possibly become the subject of "Mutual Insurance" as between the company and a mutual member.

3. The actual contract between the parties which equity would specifically enforce, in case the policy itself failed to express it correctly, is established by the written application

(in duplicate) signed by Boyd, the insured, after it had been made out by the company's agent, on one of its printed forms, and who also filled in the several particulars, such as the nature and the description of the property to be insured, and which application was duly accepted by the company, and the policy in alleged pursuance of this contract between them subsequently made out and sent to the insured.

4. The application for this insurance expressly states that it was a "mercantile risk" and of the class "mills or factories," and in these essentials distinct from mutual insurance and properly insurable by members of the company.

5. The circumstances under which this contract, was entered into are consistent with the application and policy being construed as one of general insurance, and remove all ground for any question that there is any ambiguity in their language, which might be interpreted into a case of mutual insurance. The principle is concisely stated in *Wood v. Priestner*, L. R. 2 Ex. 66, by Kelly, C. B., at p. 68: "When the words are at all ambiguous, * * a consideration of the circumstances" is required. "It is, therefore, necessary to look at the existing state of things, and looking to that, to construe the words in such a way as we consider most consistent with the intention of the parties, * * taking the words themselves together with the surrounding facts as the exponents of the meanings of both" parties; and by Bramwell, B., at p. 70: "We not only may, but *must*, in the case of every contract, have evidence of who are the parties to it, and what are the circumstances to which it relates?" Verbal evidence is also admissible to shew what the parties had in view in contracting. See also *Bowman v. James*, L. R. 3 Ch. 511. There is abundant evidence here to shew that both parties intended that the mills and like property of Boyd should be effectually insured, and the company knew that it could only fulfil its part by the exercise of the ample power granted by section 15 of its Act of Incorporation, which authorized it to effect contracts of insurance with any person whomsoever, on any buildings

whatsoever, on any personal property whatsoever, and for such premiums or consideration as might be agreed upon between the company and the person agreeing for insurance. The evidence of Charles H. Wade, chief agent at Montreal of the company, is sufficient of itself to shew that the intention of his company was to effect this as a general insurance, and that it was an important part of the business of his company, to insure saw mills and woollen mills, and grist mills, as many as fifty having been so insured. Also the correspondence.

6. Before any contract of mutual insurance can be said to exist apt words must be found to create it, and such cannot be implied when the special obligations of a mutual member of the company have thereby also to be assumed, and rights and remedies essentially different and inferior to those under a general insurance are created.

7. The mutual insurance policy requires, as a necessary term, that the insured has become a member of the company, and this constitutes the very basis of such contract. It is clear that by the deliberate action of the company in placing this form of policy under the conditions of the Ontario Uniform Policy Act, and not under the General Mutual Insurance Act (which applies to this company so far as it transacts mutual insurance), the company intended to incur and has incurred the liability of general insurers. It is also a principle of construction that the language is to be construed most strongly against the company, especially where it is sought to narrow or limit the force of the principal obligation expressly undertaken by it.

8. There is nothing in the decision relied upon by the learned Chancellor of *Ellis v. Beaver, &c., Mutual Ins. Co.*, 21 C. P. p. 86, which in its reasoning or upon the statutes therein referred to could properly establish any such technical or exclusive force to the word "Premium Note," as would necessarily determine the essence or nature of the contract in this case to have been one of mutual insurance. On the contrary it is as applicable to the one as the other kind of insurance, and as Gwynne, J., in the case referred to, well observes

(p. 89) that companies authorized to insure on the mutual principle and also generally themselves distinguished between premium notes representing the cash premium for unpaid portions in cases of general insurance from deposit notes representing the premium in cases of mutual membership.

9. The evidence further effectually displaces all and each of the defences raised in the answer of the company, and supports so much of the amended bill as was necessary for establishing a satisfactory and complete reply to all such inequitable attempts, as the learned Chancellor has in this respect rightly determined.

10. The plaintiffs also claim the benefit of such further and other grounds as upon the hearing of this appeal they may be advised to urge upon the law and evidence, for setting aside the decree of the Court of Chancery, and for obtaining a decree instead for the payment by the defendants, the insurance company, of the full amount of the plaintiffs' claim under the policy in question.

The following were the respondents reasons against the appeal:

1. The plaintiffs in in their bill of complaint treat the policy sued on as a mutual insurance, based upon a premium note or undertaking liable to assessment, averring in the fourth paragraph of the bill, that William S. Boyd had given his premium note or undertaking to the defendants' company, for the sum of \$560, and in the fifth paragraph, alleging that the said William S. Boyd had duly paid all assessments made and payable upon his said premium note and undertaking, from the time of giving the same up to and until the time of the loss by fire.

2. The papers and correspondence put in by the plaintiff shew that the policy was based upon a premium note liable to assessment.

3. The parties, as appears by the decree, agreed that the respondents should forthwith deliver up to the defendant, William S. Boyd, or to whom he might appoint, the premium note referred to in the pleadings, and should forthwith pay to the plaintiffs the sum of \$197.00, being the amount paid in respect of premiums on the policy of insurance in question.

(which agreement was performed by the respondents), and the plaintiffs cannot now be permitted to contend that the policy is in force. A consent decree cannot be the subject of an appeal.

4. As a matter of fact no proprietary stock was ever taken up or subscribed in the Canada West Farmers' Mutual and Stock Insurance Company, nor were any policies ever issued by the company in the proprietary class or branch mentioned in their Act of Incorporation, 14 & 15 Vic. ch. 163. The policy in question was issued by the respondents, under the name of the Canada Farmers' Mutual Insurance Company, and there is no evidence that they also carried on the business as a proprietary stock company.

5. If the policy is to be treated as belonging to the proprietary class or branch mentioned in the Act, 14 & 15 Vic. ch. 163, the Mutual Stock, composed of premium notes, is not liable for the payment of the plaintiffs' claim; and any decree, if made against the insurance company, could only be for payment out of the proprietary stock, or the assets of the proprietary class or branch mentioned in said Act, 14 & 15 Vic. ch. 163, secs. 2, 21, & 22.

6. The onus is on the plaintiffs of shewing that the policy sued on is within the powers of the defendants, the insurance company.

7. The fact that the agent or officers of the respondents supposed the company had power to take the risk in question, will not affect the liability of the company. The powers of the company being defined by public Act of Parliament, must be held to have been as much within the knowledge of the insured as of the company.

8. The written application signed by Boyd, the insured, was accompanied by the premium note referred to in the pleadings, so that the applicant knew that he was applying for an insurance on the mutual plan.

9. No special form of policy is necessary to distinguish a policy on the mutual plan from one on the proprietary plan; the distinction is in the mode of payment of premium. Sec. 2 of 14 & 15 Vic. ch. 163, enacts that the members or

persons composing the company shall consist of two classes, namely, those who deposit premium notes for the purpose of mutual insurance, denominated mutual members, and proprietary members, or those who hold shares in the proprietary stock of the corporation.

10. No inference is to be drawn from the indorsement on the policy of the conditions called "statutory conditions," these being proper to be used upon any policy of insurance, and it being prudent in all cases to refer to them as the statutory conditions. Until the recent decisions of *Ballagh v. Royal Mutual Fire Ins. Co.*, 5 App. 87, and *Frey v. Mutual Ins. Co. of Wellington*, 5 Sup. Ct. R. 82, it was not considered safe to omit the words "statutory conditions" at the head of the conditions endorsed on mutual policies, and these may still be used upon a policy of mutual insurance as well as upon any other policy.

11. The respondents rely upon the reasons and authorities stated in the judgment of the learned Chancellor who tried this cause.

12. The respondents allege that the said William S. Boyd, in and by the application for insurance, fraudulently overvalued the property in question for the purpose of defrauding these respondents, and these respondents were deceived into granting a policy of insurance, which would never have been issued had the facts been truly represented, and that in consequence the said insurance is null and void.

13. By one of the conditions endorsed on the said policy of insurance, it was provided that the said company should not be liable for loss if any subsequent insurance should be effected in any other company, unless and until the company should assent thereto by writing, signed by a duly authorized agent.

14. Previous to the happening of the said loss, no notice whatever was given to the respondents of the insurance which had been effected by the plaintiffs with the Scottish Imperial Insurance Company prior to the said loss, and the respondents, by reason of the failure to notify them of such other insurance, are not liable for the said loss.

15. In the event of its being held that the policy of insurances is not *ultra vires* and void, the respondents rely upon the other defences set up in their answer to the plaintiffs' bill of complaint.

On May 18th, 1881, the appeal was argued (a).

Crooks, Q.C., and *Cattenach*, for the appellants.

Mackelcan, Q.C., and *Walter Cassels*, for the respondents.

The arguments and cases cited sufficiently appear from the reasons for and against appeal.

November 28, 1881. BURTON, J. A.—It seemed to be assumed by the defendants' counsel upon the argument, that the acceptance by the company of a premium note or undertaking, was conclusive as to the character of the contract sued upon, but I am not aware of any rule of law that would stand in the way of a proprietary company accepting premiums in that way. It is not an usual mode of insuring except in the Mutual Branch, but there is nothing to prevent a proprietary company, if so disposed, accepting notes for the premiums, or accepting an agreement to pay a stipulated sum in such calls or instalments as the directors may think proper to make. We have therefore to look further than the premium note, in order to ascertain what was the real contract between these parties.

The Legislature very wisely, I think, provided by the 36 Vic. ch. 44, O., that no Mutual Insurance Company incorporated after the passing of that Act should issue policies otherwise than on the mutual principle; but this policy was reversed at a recent session of the Legislature and larger powers than ever given to these companies to transact a general business upon a system which leaves the insured members—that is, those insured on the mutual system—liable to have the whole assets upon which they

(a) *Present.* — BURTON, PATTERSON, and MORRISON, JJ. A., and CAMERON, J.

relied for indemnity swept away to pay strangers insured on the general system.

The defendants in this case have a special charter granted to them in 1851, which authorizes both modes of insurance; and section 16 directs that no mutual insurance shall be effected on certain descriptions of property, including "any kind of mills, carpenters' or other shops, which by reason of the trade or business followed are rendered extra-hazardous; machinery, brewers, distillers, or other properties involved in similar or equal hazard."

If this is a policy in the Mutual Branch, then it is contended by the defendants that the property comes under the denomination of extra-hazardous, and is a risk which the company were prohibited from taking in that branch.

What then was the contract entered into here? There is nothing on the face of the policy, if we except the fact that an undertaking for the premium is referred to, to indicate that this is a mutual policy; on the contrary it contains an absolute undertaking on the part of the company to pay the loss, which one would never look for in a policy issued to a member, which is in effect nothing more than a certificate, that the member having complied with the statutory conditions of membership by depositing his premium note, in respect of the property desired to be insured, has become entitled to all the advantages and subject to all the liabilities to which members insured in the company are entitled or subject under the laws of the province and the by-laws of the company.

I am not to be understood as saying that this is the invariable practice; on the contrary, I think it very likely that under the vicious system of amalgamation to which I have referred, it may have become the practice to issue policies in the shape in which this is issued to members and mere policy holders indiscriminately; but are we driven to say that a stranger taking such a policy as this is is necessarily assured on the mutual system?

On its face, *prima facie*, it appears not to be so; the assured is not referred to as a member, and when we refer to the application upon which it is issued, and which is incorporated with it, there is nothing to indicate that it is a mutual risk, except the heading "premium note system," which I have already intimated is not to my mind conclusive, and which is more than counterbalanced by the fact that it purports to be an application for insurance on property which *ex concessis* is of a character which the company were prohibited from insuring in the Mutual Branch.

There is nothing illegal in the company taking a promise to pay the premium by instalments in the Proprietary Branch; and when we find a company issuing a policy, which on the face of it appears to be an ordinary policy insuring property which they had no power to insure in the Mutual Branch, it must, I think, be assumed against them that it was issued in the Branch in which they could legally issue it.

It is to be noted also that upon the assignment it was treated as an ordinary policy, the assignees not being required to furnish security for the payment of the balance of the note.

If this view be correct, it disposes of the objection said to arise upon the pleadings, the sole matter relied upon being that it is admitted that the assured had paid all assessments, which is not necessarily inconsistent with an insurance in the Proprietary Branch.

Whether as a matter of fact no proprietary stock was ever issued, as alleged in the fourth reason against the appeal, does not appear in evidence, and is at all events immaterial, as one of the advantages these mutual companies have over ordinary companies is, that they are authorized to issue general policies without any subscribed stock as a basis; and the fifth reason against the appeal is based upon a fallacy, as by the 75th section of the General Act, all the property and assets of the company, including the premium notes, are liable for all losses which may arise under assurances for cash premiums.

The defence of fraudulent valuation is not sustained, and as regards the other insurance, the facts appear to be, that there was a further insurance of \$2,500 in the Niagara District Mutual, existing at the time of the effecting of the policy sued on, which was recognized and admitted upon its face. Whether that policy was still existing as a valid insurance at the time the additional insurance was effected in the Scottish Imperial does not appear to me to be material, nor is it important that the defendants had no notice of this latter insurance, as they had notice of an insurance of the same amount on the identical property in the Shefford and Brome Mutual Insurance Company, of which the defendants had notice, and which was subsequently cancelled and the policy in the Scottish Imperial Insurance Company substituted for it; and the Supreme Court have recently decided, in *Parsons v. Standard Fire Ins. Co.*, 5 Sup. Ct. R. 233, that subsequent insurance must be read subsequent further or additional insurance.

I would desire to say, however, in reference to that case, that the decision in this Court proceeded principally on the ground of a breach of warranty in reference to existing insurance at the time of effecting the policy.

In the application an enquiry was made as to existing insurances, requiring the applicant to state the amount of such insurances and in what office. And the truth of the answers to each and every of these questions was expressly made a warranty. A misstatement was made as to one of these offices, and the question was argued before us as a breach of warranty, to which we felt compelled to give effect.

On the argument before the Supreme Court it was discovered that the only plea applicable to the matter was one setting up the condition against prior insurances; and, as it appeared that insurances to the same amount as those stated in the application were assented to on the face of the policy, the defence relied on in the argument before us was not open, and was abandoned by the learned counsel. I can only say for myself that, in a similar case, where the

defence was properly raised, I should feel compelled to decide as we did in that case. We did, it is true, go further than was necessary then, and expressed an opinion that, especially having reference to the nature of the enquiries as to the offices in which prior insurances were effected, the condition requiring notice of subsequent insurances made it incumbent on the assured to notify any subsequent insurance, whether in excess of the original assurance or not, but in that respect the Supreme Court differs, and holds that these words must be read, any subsequent insurance provided it is in excess of the amount already insured and assented to.

In point of fact in the present case the cancellation of the policy in the Niagara District Mutual and that in the Shefford and Brome are admitted by the defendants in their letters of the 26th and 30th December, 1878.

It would seem to me therefore that, as to the defences raised in the answer and as to which the learned Chancellor felt it unnecessary to express any opinion, as he decided against the plaintiff on the other ground, the evidence fails to sustain them; and as the defendants have also failed to establish that the policy was a Mutual policy, the plaintiffs are entitled to a decree for the full amount assured and interest from the 11th April, 1879, less the premium note.

The appeal must be allowed, with costs.

CAMERON, J.—The defendants in the Court below raised three distinct defences or grounds against the plaintiffs' right to recover.

First—The defendants were prohibited by their Act of Incorporation from taking risks in their mutual branch on property of the description mentioned in their policy by reason of its being extra hazardous. The policy was therefore *ultra vires* and void.

Second—There was another insurance effected by the insured on the same property after the granting by the defendants of their policy, and not assented to by them in writing, signed by a duly authorized agent, which by an

express condition upon the policy relieved the defendants from liability.

Third—The defendants were induced to make their policy through misrepresentation as to the value of the property insured.

The learned Chancellor dismissed the plaintiffs' bill, upon the ground, as stated in his judgment, that the risk was one that the defendants were prohibited from taking in their mutual branch, and he found that it had been taken in that branch as matter of fact. The other points were not in express terms decided, but I assume, from his concluding remarks in the judgment delivered, he thought there was no merit therein. He said: "The point that I have dealt with goes to the very root of the plaintiffs' case, and makes it unnecessary for me to make any disposition of the other points in the case. I should have been well pleased to have been able to come to a different conclusion upon the question upon which I decide the case, for the defendants, the insurance company, in opposing the plaintiffs' claim are resisting upon inequitable grounds the payment of a just debt. I should not say this if the evidence, which was taken before myself, did not lead me to that conclusion."

A perusal of the evidence discloses ample warrant for the observations of the learned Chancellor regarding the case from the stand-point of natural justice and equity. The defendants' however, are not before a tribunal empowered to adjudicate upon the case according to natural justice, unless that coincides with what is legal and right according to the rules and principles that prevail in Courts of law and equity, and I proceed to consider the defendants' several grounds of defence in accordance with what I understand these principles and rules to require.

As to the first ground, that upon which the defendants have the judgment of the Court below in their favour:

By section 1 of 14 & 15 Vic. ch. 163, the defendants' company "may mutually insure their (*sic*) respective proper-

ties under the restrictions, limitations and conditions hereinafter contained, and may also insure the houses and personal property of others for such time and at such premiums as shall be mutually agreed upon between the said corporation and parties insuring."

By section 2, "The stock and property of the said company shall be held liable for the payment of all losses that may from time to time occur to the said company, and for that purpose shall be divided into and consist of two separate and distinct descriptions of stock, namely, Mutual and Proprietary; the mutual stock being composed of premium notes *deposited for the purpose of mutual insurance*, together with all payments and other property received or held thereon, or in consequence of such mutual insurance; and the proprietary stock, being composed of stock in shares, subscribed and paid for the purpose of fire insurance to others, which proprietary stock should not exceed £100,000, divided into shares of twenty pounds each; and also, that the members of, or persons composing the said company, shall in like manner consist of and be divided into two classes, namely; *those who deposit premium notes for the purpose of mutual insurance*, denominated mutual members; and proprietary members, or those who hold shares in the proprietary stock of the said corporation: Provided always, that nothing herein contained shall prevent the same person from holding at the same time both descriptions of stock."

By section 3: "Persons being members of the said corporation, by reason of deposit of premium notes *for the purpose of mutual insurance*, shall not be held liable for any claims for losses or payments, beyond the amount of his, her, or their premium notes respectively; and neither shall proprietary members be held liable for any claims for losses or payments, beyond the amount of such share or shares of the proprietary stock which each may respectively hold; and also, in all the transactions of the said company, the profits and benefits arising from or on account of the mutual branch of the said corporation shall be

secured to the members thereof; and in like manner the profits and benefits arising from or on account of the proprietary branch of the said company shall be secured to the proprietary members; and, further, all the expenses necessary and incurred for the conducting and management of the said company shall be fairly assessed upon and divided between each branch of the said company."

By section 15, "The corporation hereby created, shall have power and authority to make and effect contracts of insurance with any person or persons, body politic or corporate, against loss or damage by fire on any houses, stores, or other buildings whatsoever; and, in like manner, on any goods, chattels or personal estate whatsoever, and for such premises (? premium) or consideration, and under such restrictions as may be agreed upon by and between the company and the persons agreeing with them for insurance, and generally to do and perform all other necessary matters and things connected with and proper to promote these objects."

By section 16: "Provided always * * that in all cases of mutual insurance, there shall not be insured more than two-thirds the value of any building, nor shall a sum be involved exceeding £500 on any one risk" (a); "And no mutual insurance shall be effected on buildings or other property situated in blocks or exposed parts of towns or villages; nor on any kind of mills, carpenters', or other shops, which by reason of the trade or business followed, are rendered extra hazardous; machinery, breweries, distilleries, tanneries, or other property involved in similar or equal hazard."

From these provisions it is manifest the risk was one within the power of the defendants to take, and it might have been taken in the mutual branch on the buildings and machinery, if the trade or business followed did not render the risk extra hazardous.

The question under the objection to the validity of the

(a) Subsequently this amount was by 31 Vic. ch. 93, increased to \$4,000.

insurance on the ground it was *ultra vires*, is divided thus into two heads or subordinate questions: was the risk in the mutual branch at all; and secondly, if so, was the risk on the grist, carding, and fulling mills one prohibited to be taken in the mutual branch by reason of the trade or business followed making it extra hazardous.

There is no oral evidence upon the first point, and the only written evidence is to be found in the application made by the assured, W. S. Boyd, for the insurance to the company and in the policy. The former is headed "*Premium Note System*," Mercantile Risk, and the policy recites that the assured has given "*a premium note or undertaking*" to the company for \$560. The learned Chancellor, from these two documents taken together, was of the opinion that it did appear with sufficient distinctness to leave no doubt in his mind that the insurance was applied for and effected upon the principle of mutual insurance, and the evidence in his judgment preponderating that the risk was extra hazardous, found against the plaintiff. With the very greatest respect for the opinions of that most able and pains-taking Judge, both upon questions of law and fact, and doubting, when opposed to his, the soundness of my own judgment, I cannot arrive at the same conclusion.

The language of the second section of the Act, to which I have above referred, seems to imply that the giving of a premium note, *per se*, will not constitute the giver a member of the mutual branch. It is the deposit of such note *for the purpose of mutual insurance* which constitutes membership, and when this clause is read in connection with clause 15, which authorizes the company to effect contracts of insurance *for such consideration* and under such restrictions as may be agreed on, this view becomes stronger. The taking of a note by the company for insurance in the proprietary branch is clearly covered and authorized under the words "*such consideration as may be agreed on*." The form of the policy is such as would be used for effecting an insurance in the proprietary branch, and in construing it, if open to either of two con-

structions, that must be taken which is most in favour of the insured.

I think it clear from a consideration of section 21 of the Act of Incorporation, which was not adverted to on the argument, and may have escaped the attention of the learned Chancellor, a policy in the mutual branch should shew the risk was taken in that branch upon its face, and whether it was so taken or not, it was not the intention of the Legislature to leave to mere conjecture. It may be the clause was not referred to in argument or noticed in the judgment of the Chancellor by reason of the lien for the premium note on the land on which the insured property is situate having been by section 69 of 36 Vic. ch. 44, O., R. S. O. ch. 161, sec. 75, discontinued, and by section 78 of the same Act, all special Acts and parts of Acts inconsistent with that Act are repealed, and so at the time the policy in question was issued there was no right in the company to a lien, and no need of referring to the land otherwise than as describing the location of the property insured.

Assuming the effect of section 78 was to repeal the said clause 21 of the special Act, it does not displace the argument deducible therefrom, that the Legislature contemplated that in a company having the right to insure in two distinct branches its policy must distinctly shew in which branch the risk has in fact been taken.

The said clause 21 is as follows: "Every mutual member of the company shall be, and is hereby bound and obliged to pay his or her portion of all losses and expenses happening or accruing in or to the mutual branch of the company, during the continuance of his or her policy of insurance, and all the right, title, interest, and estate at the time of the insurance of the assured, of, in, or to the building insured by and with the said company, and to the lands on which the same shall stand, and to all other lands thereto adjacent, *which shall be mentioned and declared liable to the policy of assurance, shall stand pledged to the said company, and*

the said company shall have full power to sell, demise, and mortgage the same or any part thereof, to meet the liabilities of the insured for his, her, or their proportion of any losses or expenses happening or accruing to the said company, during the continuance of his, her, or their policy; *which sale, demise, or mortgage, shall be made in such a manner as shall be specified in the policy of the assured.*"

The policy in question has no provision such as contemplated by the above clause or any manner of reference to the character of the risk. And when, as by section 17, it is declared that all policies or contracts of insurance issued or entered into by the said company, signed by the president and countersigned by the secretary and under the seal of the company, shall be deemed valid and binding upon them according to the tenor and meaning thereof, it would seem impossible, in the absence of extrinsic evidence, to shewing that in truth and fact the insured, when he gave the note for the premium, and the defendants, when they received it, did so upon the mutual understanding and agreement that the insurance was upon the mutual principle, to hold it was effected on that principle merely because the application was headed "Premium Note System" and the policy acknowledges the receipt of a premium note or undertaking.

Primâ facie the contract was *intra vires*, and the defendants ought not to be allowed to set aside and avoid an Act deliberately performed and sanctioned by their corporate seal, to the disadvantage of a person contracting with them, without very clear evidence that the Act was not within the scope of their powers, especially after they have treated the policy as valid, even after the loss had occurred, and passed as the letter of their secretary of the 10th April, 1879, indicates, resolutions for the payment of a sum, which I think their inspector, upon the evidence, somewhat disingenuously induced the assured to agree to accept, though much below the amount of the loss and the sum for which the defendants were liable, if liable at all.

I do not understand how a respectable insurance company can reconcile an attempt to avoid the full payment of a just loss with any sense of justice or honour, but unfortunately the insurance cases which are brought before the Courts, too often shew that they do so ; and this is not the only company that has so offended against decency and right. I fully concede if this risk was prohibited by the Act of Incorporation, agreeing to pay the whole or any sum after the loss was ascertained would not make that valid which was clearly void ; as validity could not be given in any manner to that which was wholly beyond the company's power to perform. The authorities, if authority could be needed for so self-evident a proposition, cited on the argument and referred to in the learned Chancellor's judgment, clearly establish this. I am not at all certain on this branch of the case that the defendants would not be liable, although it could be made to appear that in fact the assured intended to become a member of the mutual branch, and to insure on the mutual principle, for the policy is the policy of the company, not of a part or section of the company, and the risk is one that could be taken by the company in respect of the proprietary branch, and it would be in the power of and the duty of the directors to charge the proper branch with the loss, and credit that branch with the premium received ; it would, in fact, be a matter of book-keeping under the provisions contained in section 3. I do not, however, base my judgment upon that ground.

Having taken this view it becomes unnecessary to determine whether, assuming the risk was in the mutual branch, it was *ultra vires*, on the ground that it was extra hazardous. The evidence is very unsatisfactory on this head, and there is a very grave question in my mind as to whether the evidence of Mr. Wade, the agent of the company, should not prevail over the evidence of the witnesses for the defence. Section 16 of the Act does not prohibit the taking of a risk upon all mills and machinery, but only on such mills and machinery as by reason of the

trade or business followed are rendered extra hazardous. The Legislature in making this provision no doubt had in contemplation some well understood trades or businesses that rendered the building where carried on more than ordinarily liable to be destroyed by fire, and by reason thereof prohibited the taking of a risk on such buildings. I can readily understand that a powder-mill, or match-factory or mill where the increased risk would be at once apparent, would come within the prohibition. But a grist mill run by water power does not seem to present the same risk, and I should like to have had some evidence of what at the time the Act of Incorporation was passed was an extra hazardous risk upon a mill.

Insurance companies have multiplied with wonderful rapidity since the year 1851, and subtleties and refinements in the classification of risks have I doubt not been of equal rapid development, as well as ingenious devices by which the payment of what to ordinary minds would seem just claims may be evaded.

When the company's agent took the risk, assuming it to have been in the mutual branch, with a full knowledge of all the circumstances, and he pledges his oath that the risk was not extra hazardous, it does seem to me a most difficult thing to say, on the evidence produced at the trial, it was a risk so clearly prohibited by the Legislature as to make the contract *ultra vires*. Yet there is no doubt very strong evidence that the carding and fulling business where the picker is used in the building, is of a dangerous and extra hazardous character.

It was not argued or contended that the general Act had repealed in effect section 16 of the special Act. If this limitation is inconsistent with any of the provisions of the general Act, it would be in fact repealed by the latter Act. And by section 34 of the general Act it is enacted "the company may insure dwelling-houses, stores, shops, and other buildings, household furniture, merchandize, machinery, live stock, farm produce, and other commodities," without any express limitation on account of

the nature of the risk. That section is therefore wide enough to cover the present risk, and the policy would clearly not be open to the objection of *ultra vires* if section 16 of the special Act is repealed. But as the point was not raised or argued in the Court of Chancery or in this Court, I express no opinion upon it except to say that there appears much room for the contention that the general Act has left nothing of the special Act, except the clause relating to the creation of the corporation and its powers as a stock company. It has in fact created a new charter as far as the corporate powers in the mutual branch are concerned, and among the new powers that of dividing its business into branches or departments as provided for by sections 60 to 63 inclusive.

If this view could be taken the defendants would be clearly liable, whether the policy is regarded as insuring the assured in the stock or mutual branch.

The next question is, was the insurance rendered void by reason of the insurance in the Scottish Imperial Insurance Company for \$500, on the grist mill, in favour of these respondents? At the time the insurance with the defendants was effected, there was existing or contemporaneously effected an additional insurance in the Niagara District Mutual Fire Insurance Company for \$2,500, which was duly noted by the defendants and allowed in their policy. Subsequently, the Niagara District Company having become unsafe, the assured, W. S. Boyd, effected an insurance in the Mutual Fire Insurance Company of the counties of Shefford and Brome, on part of the same property for \$1,300, which was duly notified to the defendants and endorsed on their policy. The policy in the Shefford and Brome County Mutual Insurance Company was dated the 10th November, 1877. This company also became embarrassed and their policy was cancelled. And these plaintiffs effected an insurance in the Scottish Imperial Insurance Company for \$2,500, of which only \$500 was on the property covered by the defendants' policy at this date. Then assuming the Niagara District policy was

at an end and the Shefford and Brome Mutual Insurance Company's not, the insurance outside of the defendants' company was only \$1,800. But if both the Niagara District and Shefford and Brome policies were at an end, the risk was only \$500, or \$2,000 less than the insurance of which the defendants were notified and had approved by their policy. Thus if the objection has any legal weight, it has none as a matter of justice.

The condition of the policy with respect to additional insurance is as follows:

The company is not liable "for loss if there is any prior insurance in any other company, unless the company's assent thereto appears herein or is endorsed hereon; nor if any subsequent insurance is effected in any other company, unless and until the company assent thereto by writing, signed by a duly authorized agent."

This is the same condition that was under the consideration of the Supreme Court in the case of *Parsons v. Standard Fire Ins. Co.*, 5 Sup. C. R. 233, wherein it was held that a change in the company making another insurance not increasing the total insurance beyond the amount allowed, did not avoid the policy, overruling the decision of this Court in that case. The objection is, therefore, not tenable; though I confess that while at the bar I thought a change in the company insuring was a matter that ought to be communicated, as it might be of much importance to the company to know why it was that a change had been made, and such a change would come within the words "subsequent insurance." It is true that the most important reason why another or further insurance should be notified is, that the company may be able to judge whether the property is over-insured, and thereby the risk becomes increased through the element of possible dishonest cupidity on the part of the insured. The decision of the Supreme Court must govern this Court, and I am pleased to be able to follow it in this case, as it permits substantial justice to be done.

Upon the last point, of misrepresentation, I will simply

say on the evidence there is nothing in it. The assured seems to have acted in the most perfect good faith. The loss, upon the evidence, was beyond the amount insured, so that the plaintiffs are entitled to recover such full amount, less any sum remaining unpaid on the premium note. What this balance is, does not appear from the evidence.

The appeal should be allowed, with costs, and the plaintiffs are entitled to a decree for the amount of the policy, \$4,000, less the amount unpaid on the premium note, and for interest on the balance from the 9th day of April, 1879, the date from which interest was to run by the agreement of the parties before the defendants had determined to dispute the plaintiffs' right. If necessary, it should be referred to the Master to ascertain what amount does remain unpaid on the premium note.

PATTERSON and MORRISON, JJ.A., concurred.

Appeal allowed.

ROBINSON V. HALL.

Nonsuit—New trial—Appeal

The plaintiff being in possession of land as tenant of H., was evicted by the defendant, who claimed under an overdue mortgage. A nonsuit was entered at the trial, on the ground that the defendant was at law entitled to possession, evidence of equitable right to possession in the plaintiff having been refused. The Court of Queen's Bench in its discretion granted a new trial. On appeal to the Court of Appeal: *Held*, that the Court could not interfere.

THIS was an appeal from the Court of Queen's Bench. No written judgment was delivered by the Court below.

The facts, so far as material, are stated in the judgment of this Court.

On November 14, 1881, the appeal was argued (a).

Bethune, Q. C., for the appellant.

J. K. Kerr, Q. C., for the respondent.

November 28, 1881. PATTERSON, J. A.—This is an action of trespass *quare clausum fregit*. The plaintiff appears to have shewn that he was in actual possession of the *locus in quo*, when the defendant entered and evicted him; or at all events he gave evidence of those facts. The right to the possession which he set up was under a written memorandum, by which one Hobson agreed to give him the right to go upon the land for \$65 for one year from 26th April, 1880. In other words, he claimed as tenant of Hobson.

It was shewn to the Judge at the trial that Hobson had, in 1879, mortgaged the land to one Wragg; and it was also shewn, though the evidence has not been reported to us, or it was conceded, and so noted by the Judge, that the mortgage was in default, and that the legal estate had become vested in the defendant. Upon this a nonsuit

(a) *Present*—SPRAGGE, C. J. O., PATTERSON and MORRISON, JJ. A., and GALT, J.

was entered, the learned Judge considering that at law the defendant was, when he entered, entitled to the possession, and, refusing to receive evidence tendered to shew some equitable rights in the plaintiff.

The Court of Queen's Bench ordered a new trial, saying nothing in the rule about costs, and the defendant has appealed from that decision.

I think we cannot interfere with what the Court below, in the exercise of its discretion, has done.

We cannot say, as a matter of law, that, even if the defendant has an assignment of the mortgage, there may not be relations respecting it between him and Hobson, which confine his rights within the limits of those which Hobson would have had if he had himself paid off his mortgage; and Hobson certainly could not, by acquiring the legal estate, have entitled himself to evict his own tenant. It is suggested that some such position as this exists. The Court below thought it fit that the parties should have an opportunity of proving the facts and documents necessary for the full information of the Court upon the contest, and we have no right to say that the Court ought to have gone on to adjudicate upon the matter without such fuller information. The new trial is not an indulgence to the plaintiff. He had made a *prima facie* case at the trial. His complaint is, that he has been turned out of Court upon a title shewn by the defendant, which may have *prima facie* shewn a legal right to the possession as against Hobson and his tenant, but which the plaintiff was refused the opportunity of shewing was one which in equity, if not at law, the defendant ought not to be allowed to assert against the plaintiff. It is impossible for us to say that the Court below did wrong in setting aside the nonsuit and ordering a new trial.

The appeal must be dismissed, with costs.

GALT, J.—It appears from the evidence the plaintiff entered into possession of the land in question under what was intended to be a lease from one Hobson, who

was the owner, and who had previously executed a mortgage to one Wragg. It was admitted Hobson was seized of the property before the mortgage, also that default had been made in payment; but it was not shewn the defendant had any claim whatever to the land. The plaintiff being in possession had a good title of possession against him, in the absence of all evidence to the contrary, and consequently, in my opinion, the nonsuit was premature.

SPRAGGE, C.J.O., and MORRISON, J.A., concurred.

Appeal dismissed.

THE ATTORNEY-GENERAL V. THE INTERNATIONAL BRIDGE COMPANY.

Injunction—Bridge company—Specific performance of Acts of Parliament—Attorney-General of Ontario—Locus standi.

The defendants were a company incorporated by the Dominion Parliament for the construction of a bridge from Canada to the United States, across the Niagara River, which was to be as well for the passage of persons on foot, and in carriages, and otherwise, as for the passage of railway trains. The company completed the bridge for railway purposes only. The time limited by the charter for the completion of the work having elapsed, an information was filed seeking to restrain the use of the bridge by a railway company to which the bridge had been leased, until put into condition for ordinary traffic, or for the removal of the bridge as a nuisance, and to compel permission of its use by foot passengers on payment of the statutory tolls. The bridge, owing to it is said to engineering difficulties, could not be adapted to the use of carriages and foot passengers.

Held, reversing the judgment of SPRAGGE, C., reported in 28 Grant 65, that the abandonment of that portion of the work relating to foot passengers and carriages was not a public nuisance; and the Act of incorporation was not a contract with the public, but merely gave conditional powers creating correlative duties, and was permissive; and that specific performance thereof would not be enforced.

Held, also, that the Attorney-General for Ontario, as representing only a limited portion of the public with whom, if at all, such contract existed, had no *locus standi*.

The work being one within the jurisdiction of the Parliament of Canada, that parliament, presumably with the knowledge of the state of the bridge, allowed debentures to be issued upon it.

Held, upon this ground also the Attorney-General of Ontario was not the proper party to file the information.

Held, also, that as the bridge extended beyond the limits of the Province, part only being therein, it would be unavailing for the Court to give the public the right to pass over that part of the bridge only which was within its jurisdiction; and for this reason, also, the Court would not interfere.

THIS was an appeal from the judgment of Spragge C., reported in 28 Gr. 65, where the facts are fully stated.

On May 19th, 1881, the appeal was argued (a).

E. Blake, Q.C., and *Walter Cassels* for the appellants. The Chancellor erred in giving any relief at the instance of the Attorney-General for the Province of Ontario. The defendants, the International Bridge Company, are a corporation incorporated by the laws of the Dominion of Canada. They

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are also a corporation incorporated by the laws of the United States of America. The bill, in effect, is a bill praying specific performance against the defendants, the International Bridge Company, of their Act of Incorporation. The informant alleges that the defendants have completed a portion of the structure as required by the Act of Parliament, but the complaint is that they have not fulfilled all the conditions required by the Act, because they have not constructed a carriage-way or a foot-way. There is no objection to the form of the structure so far as it has been completed, but the objection is on the ground of the noncompletion of the whole of the structure. The Attorney-General for the Province of Ontario has no jurisdiction to pray for the fulfilment of obligations created by the Dominion Charter, and by the Act granted in the United States. This bridge, by the Confederation Act, is a structure within the sole control of the Dominion, and if an information would lie at all, such information can only lie at the instance of the Attorney-General for the Dominion of Canada. There are numerous reasons why such jurisdiction should not be exercised by the Attorney-General for the Province of Ontario. It might lead to serious international complication with the United States of America if the decree of the Chancellor were enforced. Assume that the defendants did not comply with the decree, what is the result? The prayer of the information asks that the bridge should be removed, and a decree to be carried out would require to be supplemented by an order declaring the bridge to be a nuisance and removing it. The prayer of the information asks this relief. There is a marked difference between this case and that of a completed structure and an information being filed merely to protect the rights of the Citizens of Ontario, such as the *Attorney-General v. Niagara Falls Bridge Co.*, 20 Grant 34, where the information did not seek in any way to affect the structure as completed, but merely sought to prevent the defendants from preventing people from crossing. In this case no relief can be granted unless the structure is altered so as to comply with their charter, and these appellants

submit that the Attorney-General for the Province of Ontario has no status to apply for any such relief. The bridge is not constructed upon lands belonging to the Province of Ontario, but is solely within the jurisdiction of the Dominion of Canada. It was an improper exercise of the discretion of the Attorney-General in signing such an information, if such right existed. The information alleges that the bridge is a public nuisance: that it stops the navigable waters of the River Niagara; and the information prays the removal of the structure, so that the nuisance may be abated. The evidence conclusively and clearly shews that instead of the bridge being a nuisance and being a source of inconvenience to persons residing at and near the bridge, and instead of its being a public nuisance, as stated in the information, it confers large and great advantages upon the people of Ontario, and it would be a public calamity if the information of the Attorney-General were granted and the bridge were removed, and for this reason also the information should have been dismissed. The evidence also shews that the information is not granted in the public interests, but is solely granted in order to benefit the relator, Robert George Barrett; and that there is therefore no ground whatever on which the granting of the information can be justified. There is no jurisdiction in the Court of Chancery to make the decree which the learned Chancellor has made. The evidence discloses the fact that it would be unsafe to permit foot-passengers to cross the said bridge. It also appears from the evidence that the said bridge is not a continuous structure across the River Niagara, and even if the Attorney-General for Ontario has any right to sue, and if the Court of Chancery has any jurisdiction to grant a decree, such decree could only affect the bridge so far as the said bridge is within the Dominion of Canada. It appears from the evidence that the said bridge is only constructed as far as Squaw Island: that across Squaw Island the said bridge is built upon an embankment. It would be impossible to construct a foot-way across Squaw Island without building up an embankment and allowing foot-passengers to cross on

the embankment. Therefore the decree of the Chancellor would only affect the bridge company so far as the bridge extended, viz., until it reached Squaw Island; but the evidence shews that such a foot-bridge would be of no use whatever, and nothing is gained by such a decree, and the appellants, therefore, submit that such a decree should not have been made. Looking at the evidence in the case, it appears that a large sum of money has been expended in the construction; the bridge is of great public value, and the Court should not interfere. Bonds also have been issued charged on the bridge, and statutes passed recognizing these bonds as valid securities, and the Court should not interfere with the rights of the bondholders.

MacLennan, Q. C., and *McCarthy*, Q. C., for the respondents. The decree of the Court of Chancery is right so far as it grants relief to the informant, but it should have gone further, and should have granted relief in respect to the adaptation and use of the bridge for ordinary carriages as well. By the Act of Incorporation of the company it is declared that the bridge should be as well for the passage of persons on foot and in carriages and otherwise as for the passage of railway trains. See 20 Vic. ch. 227. By a subsequent Act, 22 Vic. ch. 124, sec. 2, the intention of the Legislature in this respect is repeated, and it was evidently contemplated that as soon as it was ready for railway trains it would also be fit for ordinary foot and carriage traffic. By the Act, 35 Vic. ch. 63, sec. 2, D., authorizing and legalizing the lease to the Grand Trunk Railway Company, the rights and privileges of the public in respect to the use of the bridge were expressly saved. The agreement between the bridge company confirmed by the last mentioned Act and set out in the schedule thereto, recites that the bridge is to be both a railway and a carriage bridge—See the recital, p. 239, Stat. of Can., 1872,—and therein the bridge company covenants, sec. 2 of the agreement, p. 230, to construct and complete a railway carriage bridge with a carriage and foot way. It is clear, therefore, that the bridge authorized by the Legislature was for

the use of the public on foot and in carriages, as well as for railways, and it is equally clear that the bridge company covenanted with the railway company to construct that sort of a bridge. It appears further that the contract, under which the bridge was built, made express provision for the floors and fixtures necessary to make it a railway, carriage and foot bridge, and also to complete the carriage and foot-way across Squaw Island, and it was provided that it should be ready for traffic on the 1st of January, 1872, and that the carriage and foot-way should be ready on the 1st of July afterwards. See the contract with Messrs. Gzowski and Macpherson of 19th May, 1870. This contract was confirmed by another, dated 1st January, 1872, without any alteration of the provisions as to the carriage-way and foot-way. Mr. Gzowski, in his evidence, proves that the bridge was constructed under these contracts, and no other. These contracts were first produced and seen by the informant at the trial. The plans and specifications which should have been annexed to them are not produced by the defendants or accounted for. If they had been produced, they must have harmonized with the body of the contract and have exhibited a roadway adapted both for railway and ordinary carriage traffic, and it is evident that the intention and design were that the same roadway should be adapted for use by railways, common carriages and foot passengers. It is proved by the evidence that the roadway could readily and at moderate expense be planked, so as to be adapted to carriage and foot traffic as well as railway traffic. See particularly Mr. Gzowski's and Mr. Spicer's evidence, as well as the evidence for the informant generally. The case then is, that the bridge was authorized by the Legislature and constructed by the company as a public highway, with this difference from the ordinary highways of the country, that it might be used by railways also. The railway company has monopolized the use of the highway to the exclusion of the public altogether. The defendants accomplish this by refusing to put down the necessary planking for carriage traffic, and by refusing to allow pedestrians to enter the bridge at all.

They say it is true the Legislature intended the public to have the use of it, and we have made it so that it could be so used by planking it properly, but we will not let the public use it; we will give the exclusive use to the railways, and we will not let them walk in the centre because the railway companies want that all the time, and we will not let them walk along the sides because it is dangerous. This is clearly illegal. The company is bound to give the three kinds of traffic fair play, and not to discriminate in favour of the railway company in giving them sole and exclusive possession. There is not a shadow of justification or excuse for this conduct. The extent of the railway traffic is pleaded, but it is no justification of the exclusion of the public. Regulations and arrangements could easily be made giving the public the exclusive use of the bridge during certain hours of the day, and giving the remaining hours to the railway. This would carry out the intention of the Legislature, and would give all parties their rights. It is objected that the Attorney-General of Ontario cannot maintain this suit, but the contrary was decided in *Attorney-General v. Niagara Falls Bridge Co.*, 20 Gr. 34, which has always been followed since, and has never been questioned. It is also objected that the remedy is by mandamus. If so, the Court of Chancery now possesses the same mandatory jurisdiction as the Common Law Courts: *Raphael v. Thames Valley R. W. Co.*, L. R. 2 Ch. 147; *Attorney-General v. Mid-Kent R. W. Co.*, L. R. 3 Ch. 100; *Attorney-General v. Eley, &c., R. W. Co.*, L. R. 4 Ch. 194; *Krehl v. Burrell*, L. R. 7 Ch. D. 551. The full measure of relief claimed by the informant should have been granted in the Court below, with costs. The informant also relies on the judgment of the learned Chancellor in the Court below.

Blake, Q. C., in reply.

November 28, 1881. BURTON, J. A.—The information in this case is based on the assumption that the bridge, not having been constructed in conformity with the requirements of the Act of Parliament authorizing its construction, is not

the structure authorized by the Legislature and a nuisance, and the principal prayer of the information is directed to obtaining the decree of the Court to abate the nuisance and remove the structure from the navigable waters of the Niagara river, and I do not for a moment doubt the right of the Attorney-General of Ontario to represent the public in any such case, either in equity or by prosecution at law. There is abundance of authority for informations directed to the repression of acts which the parties had no legal right to do, and which were not only not authorized to be done, but were in fact acts of public nuisance. If, for example, the company had proceeded to build one of the piers and had then abandoned the work, there could be no question of the right of the Attorney-General to prefer an indictment for a nuisance, or to take such other proceedings as he might find most expedient to guard the public interest; but the decree is not based upon that prayer of the bill, and although the argument was faintly renewed before us that the bridge, not having been completed so as to serve all the purposes referred to in the Act, is a nuisance, it is perfectly manifest, for the reasons stated by the learned Chancellor, that that contention cannot prevail. The piers, which alone could constitute the impediment to the free navigation of the river, are not complained of, and the main structure, that is the bridge for the conveyance of trains has been built in a manner which is shewn to be admirably adapted to this purpose; and to hold that such a structure, which has been put up at an enormous expenditure of skill and money, and upon which the Legislature has authorized a debt of several hundred thousand dollars to be charged, could be abated as a nuisance, because the company has omitted or refused to complete some portion of the structure intended for the use of carriages and foot-passengers, and not in the slightest degree affecting the navigation of the river, would be a reflection on the administration of justice. The fallacy consists in calling the abandonment of a portion of the work a public nuisance, instead of, what it probably is, an abuse of the Act of Parliament.

If the information had contained only such allegations as those upon which the decree is based, omitting all reference to the structure being a nuisance, and confining its prayer to the relief now granted, I apprehend it would have been demurrable, both on the ground that no contract with the public is shewn, and because the Attorney-General for Ontario, who can represent only a limited portion of the public with whom, if at all, such a contract exists, has no *locus standi* on such an application.

The work is one within the jurisdiction of the Government and Parliament of Canada. That Parliament, presumably with the knowledge that it was only completed for railway traffic, has nevertheless recognized it, and allowed a large amount of debentures to be issued and charged upon it, and upon which therefore the holders rely for repayment; and it may be that the Attorney-General of the Dominion, acting for the Crown, is not disposed to exact this further performance, or may be prepared to recommend the passage of a bill to dispense with it. It would be a strange anomaly if, notwithstanding this being the feeling of the Dominion authorities, a bill could be filed by the Attorney-General of the Province seeking in effect to compel the specific performance of this Act of Parliament. Regarded therefore in that light, I am disposed to think the Attorney-General of Ontario is not the proper party to file this information.

But I am of opinion that no grounds have been shewn for the interference of the Court. It is now perfectly well established, since the decision of the Exchequer Chamber in *Regina v. York and North Midland R. W. Co.*, 1 E. & B. 858, that Acts of this description are not to be regarded, as they had come to be regarded, as contracts: that they are what they profess to be and nothing more; they give conditional powers which if acted upon carry with them duties. Statutes may be so framed as to render it obligatory upon the companies to proceed with the works, but that is not so in the present case: the words of the Act are simply permissive; nor is there, in my opinion,

anything in the argument that although originally permissive it ceased to be so and became obligatory when once begun. Suppose the company had constructed the foot-way as the least expensive portion of the work, and then finding the railway bridge too expensive had abandoned it, could it be contended with any force that the shareholders should, at a ruinous loss to themselves, proceed with its construction? Yet that must follow, if this argument be sound.

It would have been a very different matter if the works had been fully completed. I do not for a moment doubt that in such a case a company could be compelled by mandamus or decree of this Court fairly and fully to carry out the objects for which they were created: *Rex v. Severn and Wye R. W. Co.*, 2 B. & Al. 645.

For these reasons I think this decree cannot be supported, for I assume the fact to be, not that a foot-way for passengers has been made, but that parties can manage to pass on foot by the side of the track, and that that portion of the bridge has not been completed any more than the carriage-way in compliance with the Act of Parliament. But I think that independently of these considerations it is manifest that the jurisdiction of this Court to grant relief cannot extend beyond the limits of the Province, and it being a fundamental principle of the law of mandamus, as well as of injunction, that it will never be granted in cases where if issued it would prove unavailable, there could be no object in giving the public the right to pass over the bridge as far only as Squaw Island; and if for no other reason this Court should not interfere.

I am of opinion, therefore, that the appeal should be allowed, and the information dismissed, with costs.

PATTERSON and MORRISON, JJ.A., and OSLER, J., concurred.

Appeal allowed.

SATO ET AL. V. HUBBARD.

Garnishee proceedings—County Court—Appeal

Held, that there is no appeal from an order made in garnishee proceedings in a County Court under sec. 313, appeals from County Courts being expressly limited to the cases mentioned in section 35 of the County Courts Act. Section 200 of the C. L. P. Act, does not give a general appeal from the County Courts, being controlled by the sub-heading preceding section 189.

THIS was an appeal from an order made by the Judge of the County Court of the County of York, in certain garnishee proceedings before him, discharging a rule *nisi* obtained by the appellant.

The facts, so far as material, are set out in the judgment.

On September 9th, 1881, the appeal was argued. (a)

Beaty, Q. C., for the appellants.

Tilt, for the respondent.

The arguments and cases cited sufficiently appear from the judgment.

November 28, 1881. SPRAGGE, C. J. O.—This is an appeal from an order made by the Judge of the County Court of York, in garnishee proceedings before him, discharging a rule *nisi* obtained by the appellants. Sato and Brieson are plaintiffs and Hubbard defendant; the Union Fire Insurance Company garnishees; and the appellants are a legal firm who claim upon the garnished fund, under section 313 of the Common Law Procedure Act, (R. S. O. ch. 50) The garnishee did not dispute his liability, and the question became one of title to the fund, between the judgment creditors and the claimants. The effect of the Judge's order was to adjudge the judgment creditors entitled to the fund, and not the claimants; and it is against this order that the claimants appeal.

The first question raised is, whether an appeal lies from

(a) *Present*.—SPRAGGE, C. J. O., BURTON, PATTERSON, and MORRISON, J. J. A.

this order. The Common Law Procedure Act does not in terms give any appeal from such an order. Sec. 313, subsec. 2, prescribes the course of proceeding upon a claim being made by a third person: "After hearing the evidence of such third person, and of any other person or persons whose evidence the Judge may, by the same or any subsequent order, think fit to require, or in case such third person does not appear, the Judge may bar the claim of such third person, or make such other order for the determination of the matter in dispute, either by the trial of an issue or otherwise, as he thinks fit, upon such terms in all cases with respect to the lien or charge (if any) of such third person, and as to costs, as he thinks just and reasonable."

What was done was this: After hearing the evidence on behalf of the claimants the Judge did, in the words of the Act, bar the claim of such third persons. It is said now that he was asked for an issue and refused it. I do not find this stated in the appeal book, and it seems strange that it should have occurred; for the facts do not seem to have been disputed, and it would have been idle in that case to have asked for an issue, and certainly not wrong for the Judge to have refused an issue if asked. It seems to have been treated by the counsel and by the Court as a pure question of law arising upon the facts appearing upon the evidence of the claimants.

The Act not in terms giving an appeal, we have to look elsewhere for the right to appeal being given. To refer first to the County Courts Act, R. S. O. ch. 43, (it being referred to by the Court of Appeal Act, for its jurisdiction in appeals from County Courts). Section 35, of the County Courts Act, runs thus "In case any party to a cause in any County Court is dissatisfied with the decision of the Judge upon points reserved, or upon any points of law arising upon the pleadings, or respecting the reception or rejection of evidence; or with the Judge's charge to the jury; or with the decision upon any motion for a nonsuit, or for a new trial, or in arrest of judgment, or for judgment *non*

obstante veredicto, he may appeal to the Court of Appeal." Section 34 makes the words "party to a cause," and "appellant," to "include persons suing or being sued in the name of others, although not mentioned in the record, and persons on whose behalf or for whose benefit any suit is prosecuted or defended, as well as parties named in the record."

I think that these clauses should receive as wide an interpretation as they reasonably can. Still, even taking the terms used in section 34 to comprehend claimants, under section 313 of the Common Law Procedure Act, and taking garnishee proceedings to be comprehended in the term "suit," a construction of the Act to which some colour may be given by the judgment of Sir Alexander Cockburn, in *Mason v. Wirral Highway Board*, L. R. 4 Q. B. D. 459, 461, we have still to examine section 35, to see *what* decisions of the Court are made appealable. There is a marked distinction between this clause and the clause in the Administration of Justice Act, in relation to appeals in proceedings in interpleader in County Courts: R. S. O. ch. 54, sec. 23. That section gives an appeal from the decision of a Court or Judge, "upon any question of law or fact arising in the course of such proceeding." But when we come to section 35 of the County Courts Act we have to take up one by one the subjects of decision thereby made appealable. Was the decision in this matter upon the claim of the appellants upon points reserved? It was not. Was it upon any points of law arising upon the pleadings? It was upon a point of law, but not arising upon the pleadings, and could not be, for there were no pleadings in the case. Was it respecting the reception or rejection of evidence, or the Judge's charge to the jury, or decision upon any motion for a nonsuit or for a new trial? These and the rest of the subjects enumerated in the section are inapplicable to the proceedings that have been had in this matter. I feel myself compelled, I confess reluctantly, to come to the conclusion that the County Courts Act gives no appeal in cases where, under section 313 of the

Common Law Procedure Act, the Judge "bars the claim of the third person." We are referred to *Van Norman v. Grant*, 27 Gr. 498, in which it seems to have been assumed that an appeal would lie. The question, however, was not discussed, and it does not appear to have arisen under section 313 of the Act.

But it is contended that the case is made appealable by section 200 of the Common Law Procedure Act, where it is said, "An appeal shall lie from any order, judgment, or decision of the County Court Judge to the Court of Appeal." This section and the two proceeding ones are headed, "In cases in the County Courts." But unfortunately for this argument these sections are grouped under a more general heading thus: "Provisions for the more expeditious determination of matters of mere account by reference to referees or arbitrators." Then come sub-divisions, the first of which is headed, "In cases in the Superior Courts," and the next is the one that I have quoted, "In cases in the County Courts." I think it perfectly clear that section 200 gives no general appeal from County Court Judges, but that it and the preceding sections from 189 inclusive are governed by the general heading to which I have referred.

The cases to which we are referred upon this point are not against this interpretation of section 200. They are *Eastern Counties, &c., R. W. Co. v. Marriage*, 9 H. L. Cas. 32, and *Wood v. Hurl*, 28 Gr. 146. The former case is very clearly summarized by Vice Chancellor Proudfoot in the latter. The distinction between the statutes referred to in those cases and section 200 is that the heading referred to in the latter case, and the head line referred to in the former, are not governed or limited by any more general heading confining their operation to a particular subject matter, as is the case with regard to section 200 and its immediate heading.

Mason v. Wirral Highway Board, L. R. 4 Q. B. D. 459, followed, (reluctantly so far as the Chief Justice was concerned,) the case of *Beswick v. Boffey*, 9 Ex. 315. The case

in the exchequer was an appeal from a County Court Judge, upon an interpleader summons, upon proceedings in which the parties to the proceedings are called plaintiff and defendant, but the Court held that the statute giving an appeal from County Courts did not apply. The statute gave an appeal where "either party in any cause," of the amount within the jurisdiction of the County Court "shall be dissatisfied with the determination or direction of the said Court in point of law, or upon the admission or rejection of any evidence." The subject matter was large enough; the difficulty was in holding parties to such proceedings to come within the definition of "either party in any cause."

The case was decided by judges of great learning and ability, Chief Baron Pollock and Barons Parke, Alderson, and Martin. The learned Judges no doubt felt themselves bound to construe the Act giving an appeal by the rule that was enunciated several years afterwards by a very eminent Judge, Mr. Justice Blackburn, in *Eastern Counties, &c., R. W. Co. v. Marriage*, 9 H. L. 32, at p. 36. "The question is entirely one as to the construction of the Act. We are bound to look at the language used in the Act, construing it with reference to the object with respect to which the Legislature has used that language, but construing it in its ordinary grammatical sense, unless there is something in the subject matter or the context to shew that it is to be understood in some other sense, and doing all this we are to say what is the intention of the legislature expressed by that language. * * Some of the Judges have in their judgments in the Court below given reasons for thinking that a different enactment would have been more expedient. They may be quite right, but it does not follow that the Legislature thought the other enactment best, or intended so to enact; still less does it follow that the Legislature has expressed such an intention, and that, I apprehend, is the only legitimate subject of inquiry. I dread, very much, the consequences, if once the judicature begins to

trespass on the province of the Legislature, and to pronounce not what the enactment is, but what it ought to be. If we do, I do not know where we are to stop. I think it much better, in construing an Act, to follow what has been called the golden rule, and to declare that to be the intention of the Legislature which appears to be expressed by the words used, understood in their ordinary sense, though with reference to the subject matter and context, unless that is manifestly absurd or unjust, which certainly is not the case here."

I quote this language of Lord Blackburn because it is peculiarly apposite to the case before us. We are constrained by the language of the Legislature to adjudge that no appeal lies in this case, though it cannot, I conceive, admit of doubt that an appeal ought to lie from decisions of County Court Judges upon such a point, and arising in such manner as was the case between the parties to this appeal. It is an anomaly that parties to proceedings in interpleader should have such general right of appeal as is given by the Interpleader Act to which I have referred, and that no appeal should be given in terms from decisions of County Court Judges in the analogous case of garnishee proceedings; leaving the appeals in the latter class of cases to the provisions of the County Court Act, which are framed obviously for causes pending in those Courts, and which, in our judgment, do not apply to such an adjudication under section 313 of the Act, as is the subject of this appeal.

I have come very unwillingly to the conclusion that no appeal lies in this case, and the more so as the inclination of my opinion is, that the decision in the County Court is erroneous.

As to costs see *Carr v. Stringer*, E. B. & E. 123; *Regina v. Padwick*, 8 E. & B. 704. See also, on the question of jurisdiction, *Fraser v. Fothergill*, 14 C. B. 298; *Beswick v. Boffey*, 9 Ex. 315, 323.

We are referred to the Dominion Act of 1869. "An Act respecting perjury," and to the heading before section

4, "perjuries in insurance cases," and to the fact that sections 4 and 5 only refer to perjuries in insurance cases, and that section 6 and the remaining sections of the Act are general, there being nothing in the printed copy of the Act between sections 5 and 6 to indicate the change from the subject of perjuries in insurance cases to perjuries generally. The change might have been indicated by the words, over section 6, "general provisions," or some other words of the like import, though I think scarcely necessary to shew the division between the particular and general subject, for the language indicates it sufficiently.

This marking of a particular subject in the Perjury Act does not touch the reasons upon which, in my judgment, the right of appeal given by section 200 already referred to, is limited to the subject matter with which the legislature was dealing.

PATTERSON, J. A.—I regret that I have to concur in the judgment which has been delivered. I have nothing to add to it beyond expressing my own sense of the unsatisfactory state of the law respecting appeals from County Courts. The decisions from which an appeal lies, were originally enumerated in 8 Vic. ch. 13, sec. 57. That clause without any essential change still appears in the statute, R. S. O. ch. 43, sec. 35. But since that clause was framed, the jurisdiction of these Courts has been enlarged. (a) In proceedings under what are called the garnishee clauses of the Common Law Procedure Act, rights of considerable magnitude may now be dealt with, and in other proceedings collateral to the regular steps in an action, judgments may be given involving important pecuniary consequences, but which, not coming within the classes enumerated as appealable, are practically final.

There was a case in this Court some years ago of *Victoria Mutual Insurance Co. v. Bethune*, 1 App. 398, in which this subject was adverted to.

BURTON and MORRISON, JJ. A., concurred.

(a) See 45 Vic. ch. 6, sec. 4, O.

GILDERSLEEVE V. MCDOUGALL.

Contract—Breach—Cause of action—C. L. P. Act—sec. 49.

The plaintiff, at Kingston, Ontario, having on the 20th October, ascertained from the defendant, in reply to his enquiry, the price for forging a cross-head for an engine, wrote on the same day to the defendant at Montreal, Quebec, "enclosing a drawing, and asking him to ship the cross-head to him at Kingston, as soon as finished, per G. T. R." In answer defendant wrote that the matter would have immediate attention, "and as soon as ready I will ship to your address." The cross-head was subsequently shipped to plaintiff at Kingston as directed, when a defect in the forging was discovered, and after being used on the plaintiff's steamer for some months it broke at the defective point. On a motion to set aside the service of the writ herein the plaintiff undertook to prove at the trial a cause of action which arose in Ontario, or in respect of a contract made therein, within the R. S. O. ch. 50, sec. 49.

Held, reversing the decision of the Common Pleas, 31 C. P. 164, that the contract being to forge and deliver on the Grand Trunk Railway at Montreal, was a contract made in the Province of Quebec, and the defect in the beam, being the breach of the warranty that it should be reasonably fit for the purpose for which it was made, existed when it left the workshop at Montreal, the breach also occurred in that Province, and the plaintiff therefore must be nonsuited.

THIS was an appeal from the judgment of the Court of Common Pleas, reported in 31 C. P. 164, where, as also in the judgment of this Court, the facts are fully set out.

On January 20th, 1881, the appeal was argued (a).

McMichael, Q. C., for the appellants. The judgment should have been in favour of the defendant. On a contract of warranty as to the condition of the article manufactured at the time of the warranty or delivery, the contract, if broken at all, was broken when the imperfect article was delivered, which delivery took place in the city of Montreal, and not when the non-compliance with the warranty was discovered. The time when the damage occurred was not the time when the cause of action arose, but the damage then occurring would be the result of the breach of warranty, which had previously taken place and which took place, if at all, at the time of delivery of the article. If

(a) *Present* — BURTON, PATTERSON, and MORRISON, JJ. A., and CAMERON, J.

there was any fraud as alleged in the declaration, the whole cause of action as to the fraud was also complete when the article was delivered in pursuance of the fraud. The plaintiff also having used the said forging for a cross-head, and paid for it after he became aware of the defect, he thereby accepted the article, and he cannot now recover the price or damages for the alleged breach, and the plaintiff by using the said forging after knowledge of the defect contributed to the damages occasioned, and should not now recover from the defendant. There was no warranty either expressed or implied. If a warranty was implied it did not extend to latent defects, which might and did become apparent in the process of finishing the forging. The plaintiff having charged the defendant with fraud in the said contract, the verdict and judgment should be for the defendant upon the general issue.

Bethune, Q.C., for the respondents. The judgment appealed against is right, and should be affirmed. The respondent's cause of action arose in Ontario; the warranty accompanied the article, and the article was intended to be used in Ontario, and damage was sustained in Ontario, and the breach of contract occurred in Ontario. The contract sued upon was made in Ontario. No objections are open to the appellant, except those in reference to the right of the respondent to maintain this action in Ontario. All other objections were abandoned by the appellant, and were not considered by the Court. The verdict was small, only \$85, and after the verdict, only the matter of law, as to respondent having a right to sue in Ontario, was considered by the Court. The payment for the cross-head was made with distinct notice to the appellant, of his liability for damages, and was in no way a waiver of respondent's right to recover, and there was not by such payment any acceptance of the article. By respondent's using the article after discovery of the defect, he sustained increased damages, but no such damages were included in the verdict—the verdict was limited to the damages as to the article itself, and included only the damages respondent sustained without reference to the using of the defective article. The contract sued upon was for an

article to be manufactured by appellant, and there was an implied warranty that such article would be reasonably fit for the purpose intended; the article was not fit, but was defective, and the appellant is liable for the breach of that warranty. The implied warranty did extend to such a defect as the one in question. In the amendments to respondent's declaration allowed at the trial the allegations of fraud were struck out, and the declaration was so amended as to be simply upon a warranty that the iron forging for a cross-head should be well and properly forged, and in every way good and sufficient to be made and finished into a cross-head to be used upon the steamer Hastings.

McMichael, Q. C., in reply.

The authorities referred to are fully set forth in the judgment of the Court below, and in the judgment of this Court.

November 28, 1881. PATTERSON, J. A.—The defendant, having moved in Chambers to set aside the service of the writ of summons, which had been effected in the Province of Quebec and out of the jurisdiction of our Courts, an order was made by the Clerk of the Crown and Pleas, of which the material parts are the following:

"Upon reading the summons granted by me herein on the 1st day of April instant, to set aside the service of the writ of summons herein on the ground that the cause of action in this suit did not arise within Ontario, * * * and the plaintiff undertaking to prove at the trial of this cause a cause of action which arose in Ontario, or in respect of the breach of a contract made therein, within the meaning of the 49th section of the Common Law Procedure Act, Chapter 50 Revised Statutes, I do order that the said summons be, and the same is hereby discharged."

At the trial a nonsuit was moved on the ground (amongst others) that the plaintiff had not fulfilled his undertaking. Leave was reserved to move, and a rule *nisi* obtained by the defendant was discharged, on the ground that, although the contract on which the defendant sued was made in Montreal, the breach of it occurred in this Province.

The appeal is from that decision.

In the form in which the question comes before us, that is to say as an appeal from the refusal to nonsuit, we are not met with the objection to our jurisdiction which would have arisen if the matter had been disposed of upon the summons in Chambers, as it was in the English cases of *Jackson v. Spittal*, L. R. 5 C. P. 542, and those in the Queen's Bench and Exchequer, in which the provision of the C. L. P. Act corresponding with our sec. 49 of R. S. O. ch. 50, had to be interpreted.

The question we have to decide is, whether or not the plaintiff proved "a cause of action which arose in Ontario or in respect of a contract made therein."

I adopt the construction given to these words in *Jackson v. Spittal*, reading them with the ellipsis expanded, as if they were "a cause of action which arose in Ontario, or a cause of action in respect of a contract made therein;" and am prepared to hold that they give jurisdiction in respect of a breach, within this Province, of a contract made beyond its limits, but to be performed within them.

The contract with which we have now to deal was made, as has been pointed out in the Court below by Mr. Justice Osler, by two letters of 20th and 22nd March, 1879, which followed some preliminary correspondence. The plaintiff required a cross-beam for the engine of one his steamboats. He could not get one of the requisite size forged at Kingston, where he lived, but he could have it planed there and fitted to his engine. On 19th March he wrote to defendant at Montreal asking his price for forging the beam, and received an answer by telegraph that it was seven cents per pound. Then, on the 20th March, he wrote the following letter:

" KINGSTON, March 20th, 1879.

" JOHN McDougall,

" Foundry, &c., Montreal.

" DEAR SIR.—I am in receipt of your telegram in answer to mine, saying you will forge cross head at seven cents per pound, and enclose drawing which explains itself.

Please leave metal enough to finish up to the sizes in the drawing, and ship to me here as soon as finished per G. T. R.

"Sincerely yours,

"C. F. GILDERSLEEVE.

"I am anxious to see how you can make your quality of iron compare with Buffalo, from where I got my last cross-head, which was most beautiful iron."

And it was answered in these words:

"MONTREAL, 22nd March, 1879.

"C. F. GILDERSLEEVE,

"Kingston.

"DEAR SIR.—Yours of the 20th duly at hand, with sketch of cross-head enclosed. The same will have immediate attention, and as soon as ready I will ship to your address.

"Yours truly,

"JOHN MCDUGALL,

"Per WM. DYER."

What was the contract thus made?

I understand the express contract of the defendant to have been to forge the beam and ship it on the Grand Trunk Railway. This was performed.

But there was also another term implied in the contract, and it is upon the implied contract that the action is brought. That was to make the beam reasonably fit for the purpose for which it was intended.

The beam was received by the plaintiff, and was finished at Kingston, and used in the steamboat for two or three months, when it broke, owing to a defect in the forging. The defect, which arose from imperfect welding of the bars of which the beam was composed, had been discovered in the machine shop at Kingston before the beam was fitted to the engine. That, however, or the subsequent use of the beam by the plaintiff, was a matter affecting damages only. The defect, of course, existed when the beam left the foundry of the defendant, otherwise he would not have been liable at all.

Now, if I am correct in understanding the defendant's

contract as being to make a reasonably sufficient forging and ship it on the railway at Montreal, it seems to me very clear that the breach, as well as the contract, was at Montreal.

I have no doubt that my reading of the contract is correct. The seven cents per pound did not, so far as I can gather from the correspondence, include freight to Kingston. The defendant was not to deliver the forging at Kingston. He was only to ship it at Montreal. See *Dawes v. Peck*, 8 T. R. 330, and other cases cited with it in *Benjamin on Sales*, 2nd ed., at pp. 135, 572, 663. His contract was to deliver at Montreal a reasonably sufficient article; and was not, in form at all events, an agreement to indemnify the defendant in case the beam broke from defective work or bad material, which might have carried forward the breach of contract to the date of the casualty. The Statute of Limitations would run, unless I am mistaken in my view of the contract, from the delivery to the railway company in pursuance of the plaintiff's order, and not from the time when the damage was sustained. (*Chitty on Contracts*, 8th ed., 751).

For these reasons I think the plaintiff failed to fulfil his undertaking.

I think also, that a nonsuit is the appropriate penalty, and is, moreover, what the plaintiff agreed to submit to in the event which, in my judgment, has happened.

In my opinion, we should allow the appeal, with costs, and direct that the rule be made absolute to enter a nonsuit.

BURTON and MORRISON, J. J. A., and CAMERON, J., concurred.

Appeal allowed.

WATSON V. SEVERN ET AL.

County Court—Liquidated demand—Jurisdiction—Evidence—Construction.

Action for the price of thirty hogsheads of goods. It appeared that K. sold to S., the defendants' testator, a quantity of goods which K., in his evidence, said was a definite quantity which he could not recollect, but not less than thirty hogsheads and not more than forty, at the price of \$10 per hogshead.

Held, that the demand was liquidated by the act of the parties at the time of sale, and the action was therefore within the jurisdiction of the County Court.

K. had assigned the moneys due to him by S.:—*Held*, that K., who was a witness, was not "an opposite or interested party to the suit," within the meaning of the Evidence Act, R. S. O. ch. 62, sec. 10, and his evidence therefore did not require corroboration as against the executors of S.

Per PATTERSON, J. A. That it was not improper to leave to the jury the question whether the amount was ascertained by the act of the parties.

THIS was an appeal from the judgment of the County Court of the County of York.

The action was on the common counts against George Severn, William Archer, and William Booth, executors under the will of the late John Severn, for goods sold and delivered by Joseph D. King to the late John Severn, being thirty hogsheads of superphosphate of lime, at \$10 per hogshead, which said claim, by indenture dated 1st May, 1880, was duly assigned by said King to the plaintiff, with interest, &c.

Pleas: 1. Never indebted. 2. Payment. 3. That the debt had not been assigned as alleged. Issue.

The cause was tried before the County Judge and a jury.

The evidence, so far as material, is set out in the judgment of Spragge, C. J. O.

The jury found for the plaintiff with \$800 damages.

In the following term the defendants obtained a rule to set aside the verdict for the plaintiff, and to enter a nonsuit or verdict for the defendants.

The rule was subsequently argued, and was discharged.

The learned Judge in his judgment discharging the rule said :—

“This cause was tried twice before me and a jury. After long and earnestly contested trials, the jury each time returned a verdict for the plaintiff for \$300. * * With regard to the verdict being contrary to law and evidence, and the weight of evidence, and that there was no corroborative evidence, it was left to the jury to say whether there was a sale between Mr. King and the late John Severn; the jury found that there was such a sale; they were asked whether the quantity and amount were liquidated by the act of the parties, they found in the affirmative; they were asked to say if the agreement was made as alleged by King, and it was ascertained at the time that \$300 or thereabouts was the amount that was to be paid. They found there was corroborative evidence. My impression was then that there was corroborative evidence. The jury found that Watson had no interest in the business, and found a verdict for the plaintiff for \$300. On the whole, I think the verdict must stand. There was much conflicting testimony, but the jury passed their opinion upon that. The clear testimony given by Mr. King, and his respectable character, corroborated as his evidence was by Mr. Watson and Mrs. Watson, Jackson, and another, no doubt produced a favourable impression on the minds of the jury. The corroborative evidence does not mean corroboration in minor matters of no moment, if the general body of the evidence is corroborated. There has been enough of litigation in this matter; the defendants have been heard twice before a jury of their own choosing, and the matter should rest.”

From this judgment the defendant appealed.

On November 8th, 1881, the appeal was argued (a).

Tilt, for the appellants. The County Court had no jurisdiction to try this case, being a claim for \$300, not liquidated or ascertained by the act of the parties or the signature of the defendant: R. S. O. ch. 43, sec. 19, sub-secs. 1, 2; *Re Hall v. Curtain* 28 U. C. R. 533; *McMurtry v. Munro*, 14 U. C. R. 166; *Wallbridge v. Brown*, 18 U. C. R. 158; *Portman v. Patterson*, 21 U. C. R. 237; *Cushman v. Reid*, 20 C. P. 147; *McPherson v. McPherson*, 5 P. R. 240. The learned Judge, at the close of the plaintiff's case, should have refused to proceed any further, as the evidence did not shew any settlement of the amount between the parties, and he should not have left it to the jury to say whether

(a) *Present*—SPRAGGE, C. J. O., BURTON, PATTERSON, and MORRISON, JJ. A.

the amount had been ascertained by the act of the parties. That was a question for the Court upon the evidence, and not for the jury: *McMurtry v. Monro*, 14 U. C. R. 166; *Re Dixon and Snarr*, 6 P. R. 336; *Portman v. Patterson*, 21 U. C. R. 287. There was no testimony to corroborate the evidence of Joseph D. King as to the amount sold, or that the amount was ascertained between him and the late John Severn, nor was there any corroborative testimony, generally, to entitle the plaintiff to recover, and this question should not have been left to the jury. The verdict was contrary to the weight of evidence, and the learned Judge should have granted a new trial: *Campbell v. Prince*, 5 App. 380. At the time Joseph D. King made the assignment of the debt to the plaintiff he was not the owner nor entitled to the same, and the said assignment conveyed no interest in the said debt to the plaintiff to entitle him to recover against the defendants.

Delamere, for the respondent. As to the question of jurisdiction, the amount was, on the evidence, "liquidated and ascertained by the act of the parties." *Fleming v. Livingstone*, 6 P. R. 68, and *Re McKenzie and Ryan*, 6 P. R. 323, both affirm the duty of trying the questions of fact in regard to jurisdiction at the trial, as was done in this case, and the facts found by the jury make the amount ascertained. The failure of King's memory as to the exact amount fixed at the time can make no difference in the fact that it was fixed: *Wallbridge v. Boyle*, 18 U. C. R. 158; *Vogt v. Brown*, 8 P. R. 249; *Ellis v. Fleming*, L. R. 1 C. P. D. 237, and *Spooner v. Juddow*, 6 Moo. P. C. 257. There was ample corroborative evidence to satisfy the conditions of R. S. O. ch. 62, sec. 10. What constitutes corroborative evidence is illustrated in *McDonald v. McKinnon*, 26 Gr. 12, following the judgment of Sir James Hannen, in *Sugden v. Lord St. Leonards*, L. R. 1 P. D. 154, 179. The weight of evidence was in favor of the finding by two juries as to the facts.

Tilt, in reply,

November 28, 1881. SPRAGGE, C. J. O.—To take first the question of jurisdiction :

The plaintiff's case is that Joseph D. King, whose assignee he is, in the year 1874 sold to the late John Severn a quantity of superphosphate, part of which was in hogsheads and part in barrels, at the price of \$10 per hogshead.

King states in his evidence what took place between himself and Severn as follows : " We settled the number of hogsheads there were, including the barrels and all, and the amount to be paid for them. I can't tell you at this distance of time the exact number of hogsheads that we settled on that occasion. I know we did settle the exact number." After King had given his evidence he was recalled : Q. " Did you say it was ascertained at the time—the amount and the quantity ?" A. " Oh yes your Honour, there was a perfect understanding between me and Mr. Severn in reference to the whole matter." Q. " That is to say, at the time, the amount of phosphate and the amount to be paid ?" A. " Yes your Honour."

Some of the cases cited to us were under the Law Reform Act, in which the extended jurisdiction is confined to cases where the amount is ascertained by the signature of the defendant. Under the County Court Act the jurisdiction is extended to \$400 " where the amount is liquidated or ascertained *by the act of the parties*, or by the signature of the defendant."

In interpreting this provision the Court have not limited the jurisdiction to cases where the gross amount in one exact sum has been settled between the parties, but have held it to apply to cases where the acts of the parties enable the Court at once, as a mere matter of computation, to ascertain what sum one party has agreed to pay to the other, and that although oral testimony may be required to establish it.

Wallbridge v. Brown, 18 U. C. R. 158, is an instance of this. Upon the trial a paper signed by the defendant was produced, which ran thus : " Received from W. A. Wallbridge, one iron lathe, pulleys, &c., for which I

am to pay him the invoice price, (to Jordan & Earle), and the charges of freight, duties, &c., and am to be allowed \$30 deduction from the whole amount," The invoice price and the amount of charges and duties were proved *viva voce* by a witness called for the plaintiff.

Sir John Robinson, who delivered the judgment of the Court, said the demand " was plainly liquidated by the act of the parties; that is, by their express agreement. The defendant was bound to pay first the invoice price of the person who had furnished the articles to the plaintiff, and what that was would appear on production of the invoice. Then the defendant was to pay the freight, duties, &c., which could in like manner be made certain as to amount, by shewing what the plaintiff had paid for freight and duties." The language of the Act in force at that time was identical with the language of the Act in force now.

I do not find that the decision in *Wallbridge v. Brown*, has been questioned in any other cases, or indeed that any other cases run counter to it. Nor do I think that the holding of the demand in that case liquidated by the act of the parties was doing any violence to the language of the statute. The meanings given to the word "liquidated," in the Imperial Dictionary, are "settled, adjusted, reduced to certainty, paid." The last is, of course, inapplicable; each of the other three is appropriate to what was done by the parties in that case; and I think appropriate to what was done in this case.

If the witness King were able to say now, from memory, that he and Severn settled upon 30 hogsheads as the quantity sold, (the price being spoken to definitely by the witness) or upon any definite greater number under 40, the case, I apprehend, would be free from doubt. What he does say is, that a definite quantity and a definite price were at the time settled between them, the price being \$10 per hogshead, and the quantity not less than 30 hogsheads and not more than 40. It appears to me that by this evidence all the requisites of the statute are complied with. There was a demand liquidated by the act of the

parties at the time. There is a failure of memory as to the exact quantity ; that, however, does not touch the fact of there having been, at that time, a liquidated demand settled upon between the parties ; certain as to price, and upon the evidence certain also as to quantity, that quantity being as much as 30 hogsheads. The plaintiff is willing to take it at that. The defendants can hardly object that it may have been more. In my opinion the case is brought by the evidence within the jurisdiction of the County Court.

Section 10 of the Mercantile Amendment Act, R. S. O. ch. 116, does not apply to anything in this case. It is not shewn or even suggested that any defence was open to Severn which is not open to his executors. I speak only of matter of defence, not of evidence, the latter is governed by ch. 62 of the same Revised Statutes.

Section 10 of that statute requires corroboration : " An opposite or interested party to the suit shall not obtain a verdict * * on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence be corroborated by some other material evidence."

If King were plaintiff the Act would apply directly, but he is not plaintiff or a party to the suit at all, nor is he interested in the suit, in the sense in which the word "interested" is used in the statute. But if he were plaintiff, or a party to the suit interested in the result, the requirement of the statute is complied with. The facts deposed to by the plaintiff himself, by his wife, and by John Jackson, are all material pieces of evidence corroborative of the evidence of King ; and upon points which are emphatically the very points in dispute between the parties. It is corroborative evidence within the meaning of the term as understood and defined by Sir James Hannen, in *Sugden v. Lord St. Leonards*, L. R. 1 P. D. 179.

The last objection is, that the verdict is contrary to the weight of evidence. The cause has been tried twice be-

fore a jury with the same result, and the Judge does not express himself as dissatisfied with the verdict. I confess that the evidence impresses me with the idea that the plaintiff's case was open to a great deal of suspicion; but after two trials long and earnestly contested as the learned Judge styles them, the jury having come to the same conclusion in both, we cannot say that the Judge was wrong in refusing the defendants' application for a third trial.

PATTERSON, J. A.—I agree that we should dismiss this appeal. The main fact in the case is the sale. It is possible that, having regard to the stale character of the demand and the other circumstances of the case, we might be disposed to look upon the evidence given for the plaintiff with less favour than was extended to it by the jury. But the jury having found, as another jury had previously done, for the plaintiff; and as it is impossible to say there was not evidence to support those verdicts, we ought not to reverse the judgment of the Court below on the ground that a new trial ought to have been granted because the verdict was in our opinion against the weight of evidence.

Upon the legal questions I agree substantially with what has been said in the judgment of his lordship the Chief Justice, though I may not employ exactly the same reasoning. I treat the amount sued for as having been liquidated by the act of the parties by an actual settlement, the exact amount of which cannot be stated by the witness who speaks of it, but which was at least \$300. The question of this statement of account was left to the jury, with the express direction that the plaintiff was not entitled to recover unless the sale was made as alleged by King, and it was ascertained at the time that \$300 was the amount to be paid. If an action were brought upon an account stated, the question whether an account had been stated would be directly raised by a plea of the general issue, and would of course be a proper question for the jury. I cannot say that when the statement of account in this case, or the ascertainment of the amount by the act of the

parties, which I take to be another form of expression for the same thing, became a question on which the jurisdiction of the Court depended, it was improper to leave it to the jury, or to be guided by their finding.

I agree that there is sufficient corroborative evidence, on the grounds stated by the Chief Justice; but as it is unnecessary to decide whether, in case King had appeared to have a pecuniary interest in the result of the suit, his evidence would have required corroboration under the statute R. S. O. ch. 62, sec. 10, I desire to guard myself against being understood to hold that the expression "opposite or interested party to the suit" includes any one who is not a party to the suit, however direct his interest may be; or that, if it had happened that King had retained any beneficial interest in the chose in action upon which the action is brought, the suit could have proceeded without his being a party to it.

BURTON and MORRISON, JJ. A., concurred.

Appeal dismissed.

THE ANCHOR MARINE INSURANCE COMPANY V. THE
PHOENIX INSURANCE COMPANY.

Insurance—Freight—Loss.

The plaintiffs were insurers of a cargo of grain, and the defendants insurers of both hull and freight of the vessel, which was owned by M. The vessel sank during the voyage and damaged the grain. Both the owner and the plaintiffs thought it more prudent to take the cargo to Buffalo, as being more saleable there than in Kingston, its original destination. M. however refused to deliver it to the plaintiffs until his freight was paid in full, and the plaintiffs thereupon paid it, and took an assignment of his policy on the freight, on which they now sued the defendants. It was found as a fact at the trial that the cargo might have been taken to its destination in specie, and the freight earned.

Held, affirming the decision of the Common Pleas, 30 C. P. 57, that the plaintiffs were not entitled to recover; for their only rights were those of M., who had suffered no loss for which the defendants were liable, inasmuch as the freight had not only not been lost by the perils insured against, but had not been lost at all, he having received it in full.

THIS was an appeal from the judgment of the Court of Common Pleas, reported in 30 C. P. 570, where the facts are fully stated.

On January 26th, 1881, the appeal was argued (a).

MacLennan, Q. C., for the appellants. The defendants were insurers both of the hull of the vessel and of the freight, and when the accident occurred they took possession and control of the vessel and cargo. The voyage had come to an end, and it was so treated by the defendants. They neither proposed nor offered to complete it, and there was a virtual abandonment of the freight by the owner, and an acceptance of the abandonment by the defendants. By so doing they became liable as for a total loss of freight, but sought to protect themselves by withholding the cargo from the plaintiffs unless they paid the freight. They refused freight *pro rata*, which was offered. Under this pressure the plaintiffs purchased from the owner his right to recover upon the policy, and thereupon the cargo was given up. The plaintiffs were driven to this course by the defendants, who would neither carry the cargo forward nor give it up, nor accept freight

(a) *Present*—HAGARTY, C.J., and BURTON, PATTERSON, and MORRISON, JJ.A.

pro rata. The sole question in the case is, whether there was a total loss of freight within the meaning of the policy. There was an abandonment and acceptance if that had been necessary, but no abandonment was necessary, for it was a total loss of freight: *Arnould on Marine Assurance*, 5th ed., 966-7. The master has a right to a reasonable time to carry the goods forward. He may also tranship and earn his freight. But that is subject to this, that if delay or transhipment would be followed by the total loss or destruction of the cargo he is not at liberty to do so: *Notara v. Henderson*, L. R. 5 Q. B. 846. See the judgment of Cockburn, C. J., p. 353, in which he cites Lord Stowell's language in *The Gratitude*, 3 Rob. Ad. R. at p. 354. The master must not take on the cargo with the certainty that it will perish or greatly deteriorate on the voyage: *Kidston v. Empire Marine Ins. Co.*, L. R. 2 C. P. 357. The last case cited shews that when the ship is wrecked, and the cargo loaded, there is a total loss of freight, unless the goods can properly be sent forward by other means, and are in fact sent forward. In this case it is evident they could not with propriety be sent forward, and this was so plain there was no proposal to do so. The case of *The Soblomsten*, L. R. 1 Ad. & Ec. 293, was relied on by the respondents, but that case only shews that the whole freight is payable if the owner prevents the master from sending the cargo forward, and is inapplicable to the present case. The reasons given, and the cases cited in the judgment of the Chief Justice of the Common Pleas, clearly establish the plaintiffs' right to recover.

Robinson, Q. C., and *Huson Murray*, for the respondents. The judgment appealed from is right. The defendants are liable upon the policy only in case the freight was lost to the person insured—the owner of the vessel, under whom the plaintiffs claim—by the cause insured against, the perils of navigation; and upon the evidence this was not shewn. The grain could, or it certainly was not shewn that it could not, have been forwarded to its destination, and delivered there in specie, either by the same vessel after being repaired, or by procuring another vessel. This was not

done, because the plaintiffs as insurers and owners of the cargo wished to take it to Buffalo ; and in order to get possession of it for that purpose, they, by arrangement with the master, put an end to the voyage, and paid him the whole freight, which he was entitled to claim. The freight having been thus earned and paid the master could not have sued defendants on the policy, so neither can the plaintiffs. There is no evidence that the defendants took possession of the vessel or cargo, or in any way prevented the master from completing the voyage, or the carriage of the cargo, or that they interfered more than was necessary and right as insurers of the hull. It was no part of their duty to decide whether the cargo should be abandoned or the voyage completed, nor did they take part in such decision or agree to the abandonment. On the contrary, they expressly warned the master, who they had insured, that if he abandoned the cargo he would have no claim against them upon their policy; and it was after and with knowledge of this notice that the plaintiffs took the cargo, and paid the freight. They also relied upon the reasons given, and the authorities cited in the judgments of Galt and Osler, JJ., in the Court below.

MacLennan, Q. C., in reply.

November 28, 1881. BURTON, J. A.—The defendants were insurers both on hull and freight, the plaintiffs upon the cargo. This action was brought by them as the assignees of the policy on freight.

It would tend, however, to simplify the case if it was regarded as an action brought by McIlwain, the master, through whom the plaintiffs claim, against the defendants upon their policy. The plaintiffs can have no higher claim than he had.

The learned Judge has found, and the evidence fully warrants the finding, that the cargo, consisting of a quantity of corn, might have been taken to its destination in specie and the freight earned.

The owner of the cargo and the plaintiffs, who, as I have said, were interested as insurers, decided, and I have no

doubt wisely decided, that it would be better, instead of having it forwarded to its destination, to send it to Buffalo.

They had a perfect right to do this but only on payment of freight, and McIlwain declined to deliver it without payment. The plaintiffs then, as insurers on the cargo, paid the freight and took delivery, but in making the payment they took an assignment from McIlwain of his interest in the policy; but what was there to assign; he had received his freight in full, and could have no claim therefore to be again paid?

The evidence would seem to shew that both the owners of the cargo and the plaintiffs deemed it in their interest to receive delivery of the cargo on the canal. If this is not the case, but the ship-owner wrongfully refused to carry it to its destination when requested to deliver it without payment of full freight, the owner of the cargo should, I conceive, have sought his remedy against him, and not against the defendants.

The freight was not only not lost by any of the perils insured against, but was not lost at all.

The judgment of the Court below appears to me to be right, and this appeal should be dismissed with costs.

PATTERSON, J. A.—The plaintiffs bring this action as assignees of William McIlwain, the owner of the schooner *St. Andrew*, to recover compensation under a policy by which the defendants insured McIlwain in respect of the freight on a cargo of corn shipped at Toledo, in the United States, to be carried to Kingston, in this Province. The vessel left Toledo in October, 1875. On the 4th October she was sunk, by an accident, in the Welland Canal, and the corn was wet and damaged.

The vessel as well as the freight was insured with the defendants. The cargo was insured by its owners with the plaintiffs.

I observe that the assistant inspector of the defendants hazards the opinion that the vessel could have been repaired within two or three days so as to have been fit

to continue the voyage to Kingston with the aid of a tug. But, notwithstanding this opinion, I take the whole evidence, coupled with the conduct of the principal inspector, to shew beyond fair dispute that the vessel could not have proceeded with the cargo within any reasonable time.

The learned Judge, who tried the case without a jury, found that the grain was not so much damaged as to have made it impracticable to forward it to Kingston and deliver it *in specie* as corn, if transhipped within a reasonable time; and further found that the master could, within such time, have procured another vessel in which to reship and forward it.

If the corn could have arrived in Kingston in a condition to be still properly described as corn, and even if it could have been forwarded there without further deterioration on the way, it would not have been a prudent thing, in the interest of the owners of the cargo, to have forwarded it, because at Kingston it would probably have been unsaleable by reason of there being no manufactures there in which it could be used; while at Buffalo, which was comparatively near the scene of the accident, there were starch works for use in which the wet corn could be sold.

The owners abandoned the cargo to the plaintiffs, their insurers, as a constructive total loss, and the plaintiffs, accepting the abandonment, desired to get possession of the corn in order to send it to Buffalo.

The master would not give it up, unless paid his full freight.

It is not expressly said in evidence whether or not the master had any intention to forward the cargo to Kingston. He certainly had a right to insist on doing so in order to earn his freight, if he could do so without destroying it, and that that was possible is one of the facts found. He was warned by the agent of the defendants that if he parted with the possession he must relieve the defendants from responsibility for the freight. Nothing was done by him or on the part of the defendants to provide for for-

warding the cargo, although the defendants' agent had had it removed from the vessel into lighters. They did not even enquire for vessels. In the Court below the learned Chief Justice treated the refusal to give up the cargo as vexatious and wrongful, considering that all parties treated the voyage as at an end, and that the conduct of the master was adopted at the instigation or in concert with the agent of the defendants to compel the plaintiffs to pay the freight when they were entitled to receive the cargo without making such payment. I do not see my way so decidedly to that conclusion. I gather that the advantage of sending the grain to Buffalo was so obvious, as against letting it go to Kingston, that the plaintiffs may have made it apparent that their getting possession of it was a question of terms only. They offered half the freight, which was refused; and not being able to get the property on easier terms they paid the whole freight. It strikes me as not unlikely that the certainty that the plaintiffs would not allow the continuation of the voyage to Kingston may have prevented the taking of active steps towards forwarding the grain; and that we may be going farther than a fair inference from the whole evidence would warrant, in assuming that the voyage was treated as at end in any other sense than that. Had the plaintiffs been careless about the fate of the cargo, we do not know that the master or the defendants would not have forwarded it so as to earn the freight. We are not told that the cost of so doing would have been equal to the freight.

The plaintiffs, when they paid the freight, took from the shipowner an assignment of all his claims on the defendants under his policy in respect of the freight, and they now bring this action in virtue of that assignment.

The defendants' answer to the claim is two-fold.

They deny that the ship-owner was damaged, because they say he received his freight from the plaintiffs; and they contend that, if there was a loss, it was not from the perils of the sea, but because the master, who might with

reasonable diligence have sent the goods to their destination, did not exert himself to do so.

The majority of the Court of Common Pleas, consisting of Mr. Justice Galt and Mr. Justice Osler, before whom the case had been tried, considered that upon the first of these defences the defendants were entitled to succeed. The Chief Justice after a careful examination of the facts in evidence summarized his opinion in these words: "In my opinion, then, the voyage was given up by all parties. There was no effort made or intention entertained by any one to complete the voyage. The payment of freight by the plaintiffs was a compulsory payment, without merit, value, consideration, or service performed. The plaintiffs paid it merely to get possession of their property, which was unjustly withheld from them. They paid it, not in exoneration of the defendants, but in purchase of the shipowner's remedy on his policy against the defendants, as testified by their taking an assignment from him of his claim for the freight; and under that assignment, for the reason given, I think they are entitled to recover their demand against the defendants."

If the facts were found, or necessarily resulted from the evidence, that the voyage had been abandoned, and a claim for the amount of the freight had actually accrued to the shipowner upon his policy, I see no objection to his assigning that claim to the plaintiff or to any one else who paid him what he was content to take for it. But, as I have already indicated, I do not see my way to the necessary conclusion of fact. What the shipowner insisted on was payment of his freight, not the value of his right of action on the policy. What he received was his freight. After receiving it, I cannot perceive how any claim for indemnity remained to him or could pass to his assignee. Granting that he extorted it by asserting a right to keep the goods in his hands, having received it he could not maintain an action on the ground that he had lost it. I am strongly impressed with the idea that in refusing to deliver up the grain, the master must be taken to have

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asserted that as the alternative, he would carry it on. He could not put his refusal on any other ground which would not have conceded the plaintiffs' right to it. He may have been dishonest in that assertion of intention, and he may have acted under the pressure of or in conspiracy with the defendants' agent; but when once, by whatever means, he got his freight paid he no longer had anything to assign under the policy. It is true that the fact of the plaintiffs taking the assignment indicates that they supposed the defendants might still be liable; but there is not a word in the evidence to shew that they dealt with the master on any other terms, so far as he was concerned, than the payment to him of his freight. They may have had hopes of being able to shew that the freight had become a total loss. I apprehend they could not have shewn that, consistently with the finding of fact that the grain might have been forwarded and the freight earned.

I refer to the law as stated in *Arnould* on Marine Insurance, 5th ed., 977 *et seq.*, and *Parsons* on Marine Insurance, vol. ii., pp. 160 *et seq.*, to shew the duty of the master, in ordinary circumstances, to tranship and forward the cargo when that can be done and his own vessel is disabled, the criterion not being the arrival of the ship but the delivery of the goods according to the bill of lading. We could not find as a fact that there was an abandonment of the voyage, or notice of such abandonment to the defendants, or assumption by the defendants of the cargo as on the abandonment of the voyage, without assuming a good deal which is not in evidence, and at the same time rejecting the express evidence of the warnings given by the defendants' agent not to part with the cargo without payment of the freight.

It is my opinion that on both grounds of defence the plaintiffs fail. I think the payment has been properly held to have been payment of the freight; and if this were otherwise, I do not think it has been shewn that the freight was lost by the perils insured against, because, in my judgment, it follows from the facts which have been

found that the cargo might have been sent to Kingston and the freight earned.

I think we should dismiss the appeal, with costs.

HAGARTY, C. J., and MORRISON, J. A., concurred.

Appeal dismissed.

THE ATTORNEY GENERAL OF ONTARIO v. O'REILLY.

Escheat—Attorney-General—Court of Chancery—Jurisdiction.

Held, affirming the judgment of PROUDFOOT, V. C., 26 Gr. 126, that the doctrine of escheats applies to Ontario: that the Attorney-General for Ontario is the proper person to represent the Crown and to appropriate the escheat to the uses of the Province: that the Court of Chancery has jurisdiction in such a case; and that it was proper for the Attorney-General to file a bill in the Court of Chancery to enforce the escheat.

THIS was an appeal from the judgment of Proudfoot, V.C., overruling the demurrer of the defendant Andrew F. Mercer to the information of the Attorney-General for Ontario.

The judgment is reported in 26 Gr. 26, where, as also in the judgment of Patterson, J. A., the pleadings and facts are fully set out.

On May 23rd, 1879, the appeal was argued (a).

William Macdougall, Q. C., for the appellant. The information shews that the Attorney-General is claiming, on behalf of Her Majesty, possession of the lands of the late Andrew Mercer, on the ground that they have escheated to the Crown by reason of the death of the said Andrew Mercer without heirs; but it does not shew that escheat for want of heirs is a doctrine or law that prevails or exists in this province. Escheat is an incident or fruit of feudal tenure: 1 *Bl. Com.* 72; *Co. Lit.* 12 a. Tenure in chivalry, according to the ancient feudal system of which escheats are the consequence not having been imported or transplanted into this province by positive law, the incidents or fruit of that tenure cannot be found here: *Chitty on Prerogatives*, 226. Canada was obtained from the French by treaty, and the King of England precluded himself from the exercise of his prerogative power of legislation by vesting it in an assembly of the inhabitants: *Chitty on Prerogatives*, 32. Even the common law of England does not, as such, hold in the British colonies: *ib.*, and though it was from time to time

(a) *Present*.—MOSS, C. J. O., BURTON, PATTERSON, and MORRISON, JJ. A.

established in the other British American plantations, it was not established in Quebec, or Canada, by imperial legislation: *Stokes* on the Constitution of the Colonies, 41, and note *b*; *Chitty* on Prerogatives, 82. In the now Province of Quebec the Crown succeeds to inheritances which become vacant for want of heirs by virtue of a provincial enactment: Civil Code, Article 686. No similar enactment exists in this province. But if it be held that the Imperial Act of 1791, establishing the tenure of free and common socage in Upper Canada, introduced with it the doctrine of escheat as an incident, that Act must be held to have introduced at the same time the law of England as it then stood for the recovery of escheats, and for the protection of tenants or persons in possession of the escheats. The statutes of 8 Hen. VI. ch. 16, and 18 Hen. VI. ch. 6, then and still in force in England, became and are still, under the Act of 1791, in force in Ontario. Imperial Acts cannot be repealed or superseded by the local Legislature: B. N. A. Act, 1867, sec. 129. These statutes prohibit the King from seizing or granting escheated land until inquisition, or inquest of office, shall first be had to entitle the King: *Chitty* on Prerogatives, 246, 247. The information does not shew that this has been done: *Doe dem. Hayne v. Redfern*, 12 East 96. Assuming that escheat *per defectum sanguinis* is known to our law, the Court of Chancery has no jurisdiction where there is no trust or equity for that Court to exercise: *Burgess v. Wheate*, 1 Wm. Bl. 123; *Williams v. Lonsdale*, 3 Ves. 756. The Escheat Act of 1877, 40 Vic. ch. 3, O., which assumes that lands in this province escheat to the Crown for want of heirs, and that the Attorney-General of the province represents the Crown in proceedings for their recovery, prescribes the mode of procedure, namely, an "action of ejectment:" secs 1 and 2. An action of ejectment is an action at law and "shall be commenced by writ:" R. S. O. ch. 51, sec. 2 and schedule. The Administration of Justice Act, giving the Court of Chancery jurisdiction in matters cognizable in Courts of law, was passed in 1874, 37 Vic. ch. 7, O., the Escheat Act in 1877, which is therefore "a

more recent expression of the mind of the Legislature :” *Mc-Hardy v. Township of Ellice*, 1 App. 628, 638, 641, 643. The case of *Attorney-General v. Walker*, 25 Gr. 233, referred to by the Hon. Vice-Chancellor in his judgment as authority for the prerogative right of the Attorney-General, acting on behalf of the Crown, to sue in any Court in escheat cases, does not support that doctrine. In the principal case cited by the Hon. Vice-Chancellor Blake, *Attorney-General v. Mayor of Galway*, 1 Molloy 95, 103, Sir Anthony Hatt said: “The Crown may call on the subject to come into any of the Courts. Of course I do not mean to say that *trusts* may be enforced in the King’s Bench or ejectment maintained in Chancery.” The Lord Chancellor, concurring, said: “That is just the line where the distinction is drawn.” In *Attorney-General v. Walker*, in appeal, the Court rested its judgment on the Inland Revenue Act, 31 Vic. ch. 8, D., which gives jurisdiction to any Court of competent jurisdiction, and not on the right by prerogative. The tenant, or defendant in possession, is entitled to traverse the inquisition or office: 3 *Bl. Com.* 260; *Chitty* on Prerogatives, 246, 247, 249, 251, for it is a fundamental principle of the English law that the King may not enter upon or seize any man’s possessions upon bare surmises without the intervention of a jury: 3 *Bl. Com.* 259; *Magna Charta*, Art. 39; 9 Hen. III. ch. 29. The information admits the defendant’s possession, and that this is not a case of vacant possession. The English practice in modern times, where the possession is not vacant, seems to be: 1. Inquisition by twelve jurors, summoned by the sheriff: *Chitty* on Prerogatives, 246; or by commissioners: 1 Hen. VIII. ch. 8. 2. Ejectment at common law: *Doe dem. Hayne v. Redfern*, 12 East 96. In England, the defendant in a case of this kind has an opportunity of interpleading with the Crown by title:—*Chitty* on Prerogatives, 258,—twice before he can be turned out, and then only “by the judgment of his peers:” *Doe dem. Hayne v. Redfern*, 12 East 96. The Courts always lean strongly towards applications for further investigation in cases in which property falls to the Crown, as that

generally happens, not from want of next of kin, but from failure of legal evidence of their title: *Tudor's Leading Cases*, Real Property, 3rd ed., 773. The Attorney-General for the Province of Ontario is not the proper officer to sue or to represent the Crown in escheat cases arising in this province. See reports and opinions of Minister of Justice in re Escheat Bill of 1874, disallowed. The Attorney-General for the Dominion represents Her Majesty in all matters of prerogative in the Provinces except those which are expressly assigned to the local Governments by the B. N. A. Act. The *droits* of the Crown, of the admiralty, and escheats belong to federal, not local jurisdiction, for they have not been assigned to the latter. The casual revenues of the Crown in Upper Canada were, by the Union Act of 1840, appropriated in aid of a permanent civil list, and were directed to "be paid over to the account" of the consolidated fund. They were to be paid over "during" a certain time and in certain proportions, two-fifths are to be paid into that fund "during the life of Her Majesty and for five years after the demise of Her Majesty:" 3 & 4 Vic. (Imp.) ch. 35, sec. 54. The Civil List Act of 1846, 9 Vic. ch. 114, which was embodied in an Imperial Act, 10 & 11 Vic. ch. 71, repeated and again specifically appropriated these casual revenues to the account of the consolidated fund *during* the life of Her Majesty, &c., 9 Vic. ch. 114, sec. 6. The B. N. A. Act, sec. 91, gives to the Parliament of Canada exclusive power to legislate on "all matters coming within the classes of subjects" enumerated, among which are: 1st. "The public debt and public property." 8th. "The fixing and providing for the salaries and allowances of civil and other officers of the government of Canada." And by sec. 102 "all duties and revenues over which the respective Legislatures, &c., before and at the union had and have power of appropriation, except such portions thereof as are by this Act reserved to the respective Legislatures, &c., shall form one consolidated revenue fund to be appropriated for the public service of Canada." Escheats are not reserved to the local Legislatures by the B. N. A. Act, and therefore belong

to the consolidated fund of Canada. In the exercise of its authority the Dominion Parliament has directed these revenues to be paid to the Receiver-General of the Dominion: 31 Vic. ch. 5, sec. 12, and to be collected by such officers as the Governor in Council may employ: sec. 2; and that all legal proceedings shall be taken by "Her Majesty's Attorney-General for Canada," and "in Her Majesty's name:" sec. 50; and sec. 31 Vic. ch. 89, sec. 3. The judgment of the Superior Court of Quebec, *Attorney-General of Quebec v. Attorney-General of Canada*, 2 Quebec L. R. 286, in *Re Fraser Escheat*, is not binding on our Courts, and deals with the casual revenue of the Crown in a Province where the feudal law had root, and where the lands of persons dying without heirs are expressly assigned to the Crown. The Judges found their decision in that case on a misconstruction of the B. N. A. Act. Her Majesty, through her immediate representative the Governor-General, has assumed the right to appropriate escheats in Nova Scotia since Confederation, and with her accustomed generosity, to recognize the claims of relatives who were not heirs-at-law.

J. D. Edgar and *J. Cartwright*, for the respondents. The appeal should be dismissed for the reasons mentioned in the judgment and upon the authorities therein cited, and also for the reasons given in the judgment of the Court of Queen's Bench in Quebec, 2 Quebec Law Reports, 286, and in the reports of the Attorney-General for the Dominion (Ontario Sessional papers for 1877 number 22), and of the Attorney-General for Ontario, (Ontario Sessional papers for 1875-6, number 34, p. 5). By Imperial Act, 31 Geo. III. ch. 31, sec. 43, 1791, all lands in Ontario were granted and are held in free and common socage, and escheat is an incident of tenure in socage as it was of tenure by knight service before 12 Charles II. ch. 24, (*Cruise Digest*, vol. iii., p. 401.) Before Confederation, property of this nature did not belong to Her Majesty personally and for Her private use, nor to the empire at large, but like ungranted and unappropriated wild lands belonged to the Provinces, and the Provinces still have all rights not expressly taken from

them. The British North America Act does not repeal the old constitutional Acts, or declare that all unenumerated rights founded upon or derived under the former Acts or otherwise possessed by the Provinces were to cease; and it is not pretended that the Act contains any provision which would give this property to the Dominion. Escheated and forfeited property either belongs still to the Provinces, or the Crown at confederation resumed all provincial rights which the British North America Act did not deal with, an alternative which is wholly unsupportable, as all rights of the Provinces have by the Act been divided between the Dominion and the Provinces, whatever was not given to the former being retained by the latter. Lands, mines, minerals, royalties, and other public property belonging to each Province, are by the 109th and 117th sections of the British North America Act declared to continue to belong to such Province, all having long before, by express recognition or tacit agreement, become to all intents and purposes the property of the Provinces, to be used and administered by the provincial authorities for the use and advantage of the Provinces, so that such property, in view of the Imperial Parliament, belonged to the Provinces before the passing of the British North America Act. Such was the right of the Provinces, not only with regard to lands which had never been the subject of grant by the Crown, but to lands also which had been sold by the Crown but not patented; and to lands which had once been granted, but had subsequently been surrendered for Provincial use, and to lands in respect of which Her Majesty had any sort of right or interest in trust for the Provinces. Now, escheat, which is one of the few remaining incidents of the feudal tenure, and a species of reversion, was not to the Crown unless the Crown happened to be also the lord of whom the land was held. All the lands in Ontario are held of the Crown and not of a mesne lord, and the Crown retains in them this right of escheat, and this right on ordinary principles of construction must be taken to have been included, and was included (like a reversion after a grant heretofore made for life or years) in the general words of the 109th and

117th sections of the British North America Act. It is impossible to suppose that the Imperial Parliament meant to except such a right from the operation of these sections, and what Parliament must be taken to have meant, is the test of what any enactment legally signifies. Public convenience is in favour of escheated property being dealt with by the Provinces and becoming the property of the Provinces, and in doubtful questions on the construction of statutes, the argument *ab inconvenienti* is a recognized canon of interpretation. The general tenor of the British North America Act and the provisions therein as to the distribution of powers and the division of assets and revenue, support the right of the Provinces to casual revenues like the one in question : *Attorney-General of Quebec v. Attorney-General of Dominion*, 2 Quebec L. R. 236. Escheats of the nature of the one in question are, "Royalties:" *Brown's Law Dict.* 317, 1 *Blackstone's Com.* 241; *Dike v. Walford*, 5 Moo. P. C. 434; *Attorney-General of Quebec v. Attorney-General of Canada*, 2 Quebec L. R. 236. The revenue derived from the acquisition of the land, and from the rents and profits or sale thereof, will form part of the Consolidated Revenue Fund of the Province of Ontario under the British North America Act, sec. 126, and become applicable to the public service of the Province. When lands have escheated in Ontario, *propter defectum sanguinis*, or have become forfeited for any cause except crime, suit may be brought by the Attorney-General to recover possession thereof without any inquisition being first necessary : R. S. O. ch. 94, sec. 1. The R. S. O. ch. 94, sec. 1, is clearly *intra vires* and operative, because it only assumes to deal with property escheated for want of heirs and with civil rights, and to regulate proceedings in civil matters in a Provincial Court, all of which come within the exclusive functions of a Provincial Legislature : B. N. A. Act, sec. 92, sub-sec. 13, 14. And by Imperial Act 31 Geo. III. ch. 31, sec. 43, which introduces socage tenure into the Province of Upper Canada, it is expressly provided that the introduction is subject to such alterations with respect to the nature

and consequences of such tenure of Free and Common socage, as may be established by any law or laws which may be made by His then Majesty, his heirs and successors, by and with the advice and consent of the Legislative Council and Assembly of the Province. This suit is brought in the proper forum: *Attorney-General v. Walker*, 25 Gr. 233. The Crown has always had the privilege of suing in any Court: *Bacon's Abr.*, tit. Prerogative, 467, 472; *Chitty on Prerogatives*, 245; *Attorney-General v. Mayor of Galway*, 1 Moll. 95. The subject has now the choice of forum: R. S. O. ch. 40, sec. 86, and ch. 49, sec. 21. Indeed it is expressly provided that no objection shall be allowed to a suit in the Court of Chancery, on the ground that the remedy by ejectment would be complete at law: R. S. O. ch. 40, sec. 87. These enactments apply to the Crown as well as to subjects: *Attorney-General v. Walker*, 25 Gr. 233; *The King v. Wright*, 1 A. & E. 434; *Baron de Bode v. The Queen*, 13 Q. B. 364. No objection can be taken that the Attorney-General for the Province of Ontario is not the proper officer to sue or to represent the Crown in this case, because even if the escheated lands did not belong to the Province of Ontario, Her Majesty might authorize him to sue; *Attorney-General v. Harris*, 33 U. C. R. 94, 98. If the principal avows the solicitor, neither the adverse party nor the Court can dispute his authority: *Rex v. Wilkes*, 4 Burr. 2553, 5. It does not anywhere appear that the "casual revenues" of the Crown were specially appropriated in aid of a permanent civil list, but by the Imperial Act, 3 & 4 Vic. ch. 35, sec. 54, and subsequently, Her Majesty accepted provision for a Civil List instead of "territorial and other revenues" then at the disposal of the Crown, arising in either of the Provinces of Upper or Lower Canada. These territorial revenues would include the revenues derived from the waste lands of the Crown, and it cannot be argued that simply because the Dominion provides for a Civil List, it has any right to these or any other revenues. While the Dominion has to make provision for a Civil List—B. N. A. Act, sec. 91, sub-sec. 8—so has each Province to provide for the payment of a Provincial Civil List: sec. 92, sec-sec. 9.

March 27, 1880. BURTON, J. A.—I entertained great doubt upon the argument whether the action of ejectment was not, by the Revised Statutes, substituted for the preliminary process which was previously in use, and that if therefore an inquest of office would have been necessary but for the statute, the remedy substituted for it, and that alone, would have to be resorted to.

It is not in my view of the facts necessary to consider that question, as I am of opinion, for the reasons so fully stated by my brother Patterson, that no inquest of office would have been necessary in the present case, and that the Crown is not under the necessity of resorting to the statute, but can exercise the right of selecting its forum, and of instituting therefore the proceedings in the Court of Chancery that have given rise to this appeal.

The important question, therefore, for decision is, whether property of this nature, since Confederation, goes to the Dominion, or to the Queen for the uses of the Dominion, and not to the Queen for the uses of the Province; for it is too late at this day to contend that the law of escheats *pro defecto sanguinis* does not exist in this Province; any such question must now be settled by a Court of ultimate resort.

The learned counsel for the appellant dwelt at great length in his argument on the question of the prerogative of the Crown in matters of escheats, and traced the history of the surrender of the territorial and casual revenues by the Crown to the Province of Canada in aid of a permanent civil list, and the legislation subsequent to that surrender; and contended that these funds having been surrendered and appropriated for a specific object, still remain part of the consolidated fund appropriated for the public service of the Dominion, and that escheats form a portion of these funds. The argument shewed much learning and research on the part of the learned counsel, but, after giving to it full consideration, I humbly conceive that the solution of the matter is to be found in the interpretation to be given to the language of the British North America Act, and that we need not look beyond it.

I find no warrant in that Act for the assertion so frequently made, that all rights or property not expressly given to the Province pass to the Dominion. On the contrary, I take it to be clear that the Provinces retained all property and rights which were previously vested in them under the Constitutional Acts then in force, except those which by the Confederation Act are taken from them and transferred to the Dominion.

In the distribution of the legislative powers the Parliament of Canada is authorized "to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects assigned exclusively to the Legislatures of the Provinces," although the framers of the Imperial Act have endeavoured by the enumeration of the classes of subjects upon which each should have the power of legislating, to confine each Legislature strictly within the bounds assigned to them; but when we come to the clauses dealing with the property of the Provinces very different language is used and very different considerations arise.

In the first place the Provinces already existed with a constitution of their own, with certain properties rights, assets, and revenues, and these could only be taken from them by their own consent, or by the legislation of a superior authority. All lands belonging to the several Provinces were, previous to Confederation, under our form or system of government, vested in the Sovereign as a mere matter of form, it being a simple trust for the benefit of the Provinces, but were then granted in the Queen's name by the several Lieutenant-Governors of the Provinces, (with the exception of Canada, which was then under the immediate government of the Governor-General,) and since Confederation, in all the Provinces, grants from the Crown of public lands are invariably made by the Lieutenant-Governors in Her Majesty's name.

These lands then, though nominally the property of the Crown, were in truth and in fact the property of the Province, were entirely under the control of the Executive

and Legislature of the Province, and although the right of escheat, which is sometimes spoken of as a species of reversion, was in the Crown, it was always exercised for the benefit of the parties beneficially interested in such reversionary interest, or, in other words, the Government of the particular Province in which the land was situated.

This right then, as well as the lands themselves, belonged to the Province; and when we refer to the Imperial Act dealing with these subjects what do we find?

By sec. 109, all lands belonging to the several Provinces of Canada, and all sums then due and payable for such lands, shall belong to the several Provinces of Ontario and Quebec in which the same are situate, subject to any interest other than that of the Province in the same.

The term "All lands" must be held to include any interest which the Province then held, or was entitled to, in the lands, including any reversionary interest, or interest incident to the tenure. If not, no disposition whatever is made of such interest, and it will remain in Her Majesty, not impressed with any trust, a result which it would be too absurd to suppose, but yet that would be the result, treating it as a reversionary interest or mere incident to the tenure, for in no portion of the Confederation Act is it given to the Dominion.

The right can be regarded as a prerogative right to this extent and for this purpose only, that it is convenient under our form of government that the whole public domain shall be vested in Her Majesty, but purely and solely for the benefit of the Province. The land is under the sole control of the provincial authorities. Her Majesty's name is used by them in every grant from the Crown in the same way as in many other matters; as, for instance, in every writ which, under provincial legislation, issues from the Courts of law, and in the commissions which are issued for the appointment of Justices of the Peace and other provincial officials.

Neither, then, as a prerogative of the Sovereign, nor as

an incident to the tenure, has the Dominion, in my opinion, made good its claim.

I prefer to place my judgment on the ground I have indicated above, rather than on that adopted by the Court of Appeal in Quebec, although I think there is no material difference between them.

I do not think the word revenue, used as it is in sec. 102 in connection with the word duties, can be held to apply to such property as this; but, at all events, territorial revenues cannot be meant, as lands and their proceeds are reserved to the Province by sec. 109; and it would be a forced construction of that section to hold that this reservation did not include lands re-vested in the Province by reason of the failure of persons to inherit the land granted, or the happening of the contingency upon which it was understood the Province would again acquire a title to them.

If the claim of the Dominion were once conceded, it must be regarded as controlling the general power of the Province to deal with property and civil rights. In other words, if, since confederation, property escheated to the Crown *pro defecto sanguinis* becomes the property of the Dominion, any attempt on the part of the Provincial Legislatures to alter the law of descent, and thus defeat the title of the Dominion to escheated lands would be *ultra vires*; but I regard the fact that this power of dealing with property and civil rights is given to the local Legislatures, without any express limitation, as strongly indicative of the general intention that this description of property was intended still to vest in the Provincial authorities, or, what is the same thing, in the Queen for these authorities.

I am of opinion that the judgment of the learned Vice-Chancellor is correct, and should be affirmed, and this appeal dismissed, with costs.

PATTERSON, J.A.—The questions before us arise upon a demurrer by Andrew F. Mercer, one of the defendants to an information filed by the Attorney-General of Ontario for the purpose of obtaining possession of land in the city

of Toronto which was the property of Andrew Mercer, who is now deceased.

The facts with which we have to deal are, therefore, those stated in the information. I shall make a short statement of them.

Andrew Mercer died in June, 1871, intestate, and without leaving any heir or next of kin.

He was, at the time of his death, seized in fee simple of the land.

Immediately after his death the defendants entered into possession of the land without the permission or assent of Her Majesty, and refused to give up possession to Her Majesty, or to the informant acting on her behalf in this Province.

In 1875 the defendant, Andrew F. Mercer, instituted a suit in Chancery against the Attorney-General, in which a decree was pronounced in accordance with the prayer of his bill, referring it to the Master to inquire whether the late Andrew Mercer left any heirs at law or next of kin him surviving. Pending that inquiry, an issue was tried at the instance of A. F. Mercer, which resulted in a decree that A. F. Mercer was not the lawful son and heir-at-law or next of kin of Andrew Mercer, and that the defendant Bridget O'Reilly, the mother of A. F. Mercer, was never married to Andrew Mercer ;' and directing the inquiry formerly directed to be proceeded with. That was done, and a decree was made, after a hearing on further directions, declaring that Andrew Mercer died intestate and without heirs or next of kin, and that by reason thereof his real and personal estate had become vested in Her Majesty in right of her royal prerogative. These decrees were duly signed and enrolled.

The demurrer was overruled by Vice-Chancellor Proudfoot, and the defendant Andrew F. Mercer appeals from that decision.

Four points have been made on his behalf.

First: The application of the law of escheat to lands in this Province is disputed.

Secondly : It is asserted that, if the right exists, it belongs to the Dominion, and not to the Province.

Thirdly : It is contended that the Crown can only proceed by the common law process of inquisition of office,

And, fourthly : That if inquisition of office has been rendered unnecessary by the Ontario Act of 1877, R. S. O. ch. 94, the only substituted remedy is an action of ejectment, and the Court of Chancery has therefore no jurisdiction.

The third and fourth points probably involve the same question, but for the sake of distinctness they may be treated separately.

The first point was not much pressed by counsel ; but, in connection with it, reference was made to the old feudal tenures to which escheat was incident, and to the introduction of free and common socage as the tenure upon which the Act of 1791 required grants of land in this Province to be made.

It is not necessary to follow the discussion of these topics, interesting though they may be, because they are really beside the questions with which we are concerned.

We only know that Andrew Mercer was seized in fee simple. We are not informed how or when the land first passed from the Crown. Lands in fee are held of some superior lord. "It is a man's demesne, *dominium*, or property, since it belongs to him and his heirs forever; yet this *dominium*, property or demesne, is not strictly absolute or allodial, but qualified or feudal; it is his demesne *as of fee*; that is, it is not purely and simply his own, since it is held of a superior lord, in whom the ultimate property resides : " 2 *Bl. Com.* 105.

If held in socage, it is sufficient to note from Blackstone (vol. ii, p. 89), that "Escheats are equally incident to tenure in socage, as they were to tenure by knight service; except only in gavelkind lands, which are * * subject to no escheats for felony, though they are to escheats for want of heirs."

The argument against the application of the doctrine of

escheat to any class of property is incomplete unless it points out where the title is to vest—who is the *ultimus hæres*—and this inquiry, being answered in most civilized communities in the one way, is fatal to the argument. I should say that, as I apprehended the learned counsel for the appellant, although he took this point, he took it rather as leading up to the other, which I have to notice in its proper place, that if we adopted escheat as an incident to the tenure of our lands, we took with it the necessity of enforcing it according to the ancient procedure, by inquest of office.

In considering the second objection, viz., that which denies the right of the Province as against the Dominion, I have but little to add to what was said by the learned Judges of the Queen's Bench of Quebec, in *Attorney General of Quebec v. Attorney General of Canada (Church v. Blake)*, 2 Quebec L. R. 236, in deciding a similar question in favour of the Province. I agree with them in the conclusion at which they arrived, and in the general tenor of the arguments upon which that conclusion is rested. If I have any reservation, it is with reference to one argument, which was advanced again before us by counsel for the respondent. I allude to the suggestion that the local Legislature has power to enact that upon death, intestate and without heirs, the property of the deceased shall vest in illegitimate offspring or pass to some other destination, as to charitable institutions or the like. I have not been able to see that such legislation would be *intra vires*, if it is granted that without it the property would escheat to the Dominion, and particularly if the escheat is properly regarded as a kind of reversionary interest. The argument seems to me to verge upon a *petitio principii*. It is, however, only employed by way of illustration, and leaves the force of the decision unaffected.

I think there is great force in the contention that the escheat is of the nature of a reversion, and is therefore an interest in land, and is secured to the Province as "land," even without resorting to the term "royalty," by section-

109 of the B. N. A. Act. I think at the same time that the principle applied by Mr. Justice Ramsay, in his judgment in *Church v. Blake*, to the interpretation of the word "royalty," is fairly applied, and that we are not compelled by any rule of construction to narrow its ordinary signification. We can scarcely refer to definitions of escheat in the books without finding some allusion to the reversionary character of the right. Thus *Bl. Com.* vol. 1, p. 502: "Another branch of the king's ordinary revenue arises from escheats of lands, which happen upon the defect of heirs to succeed to the inheritance; whereupon they in general revert to and vest in the king, who is esteemed, in the eye of the law, the original proprietor of all the lands in the kingdom." And in vol. 2, p. 72: "The last consequence of tenure in chivalry was escheat; which is the determination of the tenure, or dissolution of the mutual bond between the lord and tenant, from the extinction of the blood of the latter by either natural or civil means. * * In such cases the land escheated or fell back to the lord of the fee." And at p. 244: "The word itself is originally French or Norman, in which language it signifies chance or accident; and with us it denotes an obstruction of the course of descent, and a consequent determination of the tenure, by some unforeseen contingency; in which case the land naturally results back, by a kind of reversion, to the original grantor or lord of the fee." In *Chitty on Prerog.* at p. 226, similar language is employed, and he adds: "It is in this point of view that Bracton terms escheat a species of reversion." So Lord Mansfield said in *Burgess v. Wheate*, 1 Wm. Bl. 123, at p. 163: "It has been truly said, in the beginning of feudal tenure this right was a strict reversion. The grant determined by failure of heirs; the land returned, as it did upon the expiration of any less temporary interest. 'Twas no fruit, but the extinction of tenure (as Mr. Justice Wright says), 'twas the fee returned." And so the doctrine is uniformly stated in American authorities.

I merely add these observations to the discussion of the

question in the case of *Church v. Blake*, and do not attempt an exhaustive or independent examination of it, as I am satisfied to follow that decision.

I now come to the third point, which asserts the necessity for inquest of office.

"The principal rule with respect to offices is, that they are not necessary when the King's title already appears in any shape of record:" *Chitty on Prerogatives*, 248.

We must take judicial notice that all lands in this Province are held directly from the Crown, and not under any mesne lord, and that all grants from the Crown are of record. Andrew Mercer, holding in fee simple, therefore held as tenant *in capite*. The only question which at any time caused me to hesitate as to inquest ever being necessary was what seemed to me the possible necessity for a finding of record that the tenant died without heirs. I do not, however, find anything to countenance a doubt of the kind. On the contrary, it seems to be everywhere broadly laid down that upon the death of the King's tenant, without heirs, no office of entitling is necessary.

In *Viner's Abr. Office or Inquisition*, D. pp. 10, 11, it is said: "The King may be seized without office, as when the King's tenant dies without heir. *Note*—Entry by a stranger shall not alter the case."

In *Doe dem. Hayne v. Redfern*, 12 East 96, at p. 110, Lord Ellenborough, discussing the return to the inquisition in that case, which had not found of whom the lands were holden, said: "The King's tenants *in capite*, and his other known tenants, bear no analogy to this case; because there the tenure was of record, and upon the tenant's death the King was entitled to take seisin of the land, and to receive the profits to his own use, till the heir appeared to claim the land and receive investiture: and if the heir were under age, the King was entitled to wardship; if of full age, to primer seisin or relief; and if there were no heir, the King's seisin was of course indefeasible."

The circumstance that the defendants are in occupation was urged on behalf of the appellant for two purposes,

viz., to shew that there being some one to perform the feudal services there should be no escheat, and further as creating a difference between this case and one in which the possession was vacant.

The defendant is in possession, on the facts before us, as a stranger. The allegation in the information is not that he was in possession when Andrew Mercer died, but that he entered immediately after the decease. But, either way, I do not find that his presence there renders office necessary.

The whole objection is, however, covered, conclusively to my mind, by what appears in the information, where we are told that the fact is found of record that Mercer died intestate and without heirs. It has been so found in proceedings instituted by this defendant himself. I do not know that that circumstance makes the matter much stronger, but if any question could have been raised, the remark made by the Master of the Rolls, in *Burgess v. Wheate*, 1 Wm. Bl. 123, at p. 133, would be apposite: "But if any one else," he said, "could have made the objection, Burgess cannot, for he brought the Crown here first, and so is estopped. In *Sir John Warden's Case*, before Lord Talbot, there was an objection for want of jurisdiction here, and that the matter was properly triable at law. But it being disclosed that he had filed a cross bill, the Court did not enter into that objection; but said the defendant had *given* a jurisdiction." And see *Scripture v. Curtis*, 11 C. P. 345.

I think there is no point of view in which the title of the Crown does not appear of record; and therefore, on the strictest rule, no office was necessary.

Had office been necessary at common law, I have not formed a final opinion as to whether that necessity has been removed by the statute R. S. O. ch. 94. The inclination of my opinion has been that the true construction of that statute merely substitutes ejectment for inquest of office. There are considerations of weight, some of which have been pressed upon us, for refusing to extend by any liber-

ality of construction the necessary effect of that legislation. But, no office being necessary in the circumstances of this case, it is not incumbent on the Crown to resort to that statute at all. The position comes to this: the Crown being entitled to the land, finds an intruder in possession. Whatever remedy, therefore, is appropriate to the recovery of land, the title to which is undisputed, but the possession of which is wrongfully withheld, must be available; and we are merely entertaining, at the instance of the Crown, a suit such as has lately become common in Chancery between subject and subject, and which, apart from the prerogative right to resort to whichever Court the Crown shall choose, is within the ordinary jurisdiction as now established.

My opinion is, that this appeal must be dismissed, with costs.

MOSS, C. J. O., and MORRISON, J. A., concurred.

Appeal dismissed (a).

(a) This case has been reversed in the Sup. Court, 5 Sup. Ct. R. 538; and is now standing for argument in the Privy Council.

DAVIDSON V. OLIVER ET AL.

Will, construction of—Legacy—Condition.

A., by the third clause of his will, devised and bequeathed the residue of his estate to his wife, four sons, and two daughters; the devise and bequest being subject to the condition that they should all unite in paying to the executors before the 1st of January, 1877, the sum of \$1,600, and the same sum before the 25th of January, 1882, said sums to pay the shares of two of the sons, Alexander and Duncan. By the 4th clause he gave the sum of \$1,600 without condition, to Alexander and Duncan. By the 5th clause, he devised to his sons Douglas and Oliver two lots; and after giving several legacies to his daughters, he proceeded, "and further, that Alexander and Duncan work on the farm until their legacies become due." Alexander left the farm in 1871, and entered into mercantile pursuits.

Held, affirming the judgment of PROUDFOOT, V. C., PATTERSON, J. A., dissenting, that Alexander was entitled to the legacy absolutely, and that the direction that he should work on the farm, was not a condition precedent to his right thereto.

THIS was an appeal from the decree of Proudfoot, V. C.

The plaintiff was the assignee in insolvency of one Alexander Oliver; and the question was, whether Alexander Oliver was entitled to a legacy given to the said Alexander Oliver under certain circumstances.

The will, so far as material, was as follows:

"3rd. I give, devise, and bequeath all the rest and residue of my estate, real, and personal, and mixed, of which I shall be seized, possessed, and entitled to at the time of my decease to my wife Agnes Oliver and four sons and two daughters, namely: Alexander, Duncan, Douglas, Robert, Helen, Agnes Oliver, my property in the township of Onondaga and county of Brant, consisting of lots 8 and 9, in the 3rd concession east of Fairchild's Creek, county of Brant, Ontario, together with all other property above named (except so much of the stock on both farms as shall form one-third of the whole, which I hereby give and bequeath to my sons, Thomas and William Oliver, to be equally divided between them), and this bequest shall be made when the mortgage on my farm on Ox Bow Bend shall be fully paid, to have and to hold the same for their use from the year 1872, until the youngest child becomes.

twenty-one years of age, subject to the following conditions, viz., that they unite in paying over to my executors on or before the 1st January, 1877, the sum of \$1,600, and also the sum of \$1,600 on or before the 1st January, 1882, said sums to pay Alexander and Duncan Oliver's shares, as herein provided for.

" 4th. I give and bequeath to my son Alexander Oliver, the sum of \$1,600; to my son Duncan Oliver the sum of \$1,600; to my daughters Helen and Agnes Oliver, the sum of \$400 each, as herein provided, and I order the said sum to be paid to the respective legatees as follows: Alexander, on or before 1st January, 1877; to Duncan Oliver, on or before 1st January, 1882; and to my daughters Helen and Agnes Oliver, on or before 1st January, 1886.

" 5th. I give and bequeath unto my sons Douglas and Robert Oliver, their heirs and assigns, my two lots of land in the township of Onondaga and county of Brant, composed of lots Nos. 8 and 9, township aforesaid, to be divided as follows: Douglas Oliver to have lot No. 9, and Robert Oliver lot No. 8, Douglas Oliver to pay sister Helen \$400 as above provided, and to his sister Agnes the sum of \$400 as above provided; *and further, that Alexander and Duncan Oliver work on the farm until their legacies become due*, and when the youngest child becomes the age of twenty-one years, Douglas and Robert Oliver each to get possession of his lot specified, and of one-half of the stock and implements, which shall be at that time on the said lots, and the other half shall be equally divided between my sons Alexander and Duncan Oliver. Yet be it fully understood that I reserve for my wife, Agnes Oliver, the sole use of so much of the dwelling-house and furniture, situated on lot No. 8, where I now reside, as she may desire so long as she shall remain my widow, and she shall receive the sum of \$180 per annum from my son Robert Oliver."

The learned Vice-Chancellor made a decree in favour of the plaintiff. The following is the judgment of the learned Vice-Chancellor:

PROUDFOOT, V. C.—So far as the defence in this case rests upon an agreement by Alexander to waive or abandon his legacy, I think that it entirely fails. The way in which the matter strikes me is this: All the parties, the mother and the sons, were under the impression that residence upon the place was a condition precedent imposed by the testator, and that any one failing to observe that condition would forfeit the benefits given to him by that will. Mr. Duncan, who drew the will, intended it to be in that way; he thought it was a condition, and that he had imposed it as a condition; then when Alexander is about to leave, he is warned by his mother and by one of his brothers, I think, that if he leaves he will incur a forfeiture; they all understood so and supposed there was to be a forfeiture. He was warned by them that he would incur that, and he says, "I am willing to run that risk," but neither his mother nor William—neither of them—pretends to say that there was any agreement that because he was withdrawing his labour from the farm that he was going to forfeit his legacy. The whole that it amounts to is simply, "that I am willing to run the risk of forfeiting my legacy," "if it is a forfeiture by my withdrawal, I will withdraw." But it seems to me since the will did not create a forfeiture what has been done does not bar him from now seeking to enforce it. So that the whole question turns upon the construction of this will, and upon that I confess it is by no means easy to arrive at any satisfactory conclusion. It is not very clearly drawn. We would almost require Mr. Duncan to explain it himself, but as we cannot get that, and we must construe the language as we find it, we must just do the best we can with it.

Now, there is no doubt that the testator wanted his family to remain together for a considerable period. I do not think there is anything, however, in the will to shew that he intended to force Alexander to remain until he was over thirty-three years of age—for the purpose of getting the \$1,600. I think it would require very clear evidence indeed—very clear expressions—to shew that the testator intended any such thing. There is no doubt that he wanted them to live together for a period until the debts were paid off. But in the fourth clause of the will, I find a distinct legacy given to Alexander of \$1,600. There is no condition annexed to that there. He is to get the legacy on or before the first of January, 1877. Then if that clear and distinct legacy to Alexander is to be cut down, we must find language equally clear to shew an intention in the testator that he should not have it unless he remained on the property. Now I can't say that there is any such clear language as that. I do not find it in the third clause that the residence of Alexander or of any of the parties, is imposed as a condition upon them before they should be entitled to the property and the legacies. The wife and Alexander, and Duncan and Douglas, and Robert and Helen, go on and are to have the use of the property from 1872, till the youngest child becomes twenty-one years of age. Well, at first I thought that meant the personal occupation, but I do not think that it appears clear that the intention of the testator would not be satisfied by allowing them to have the use of it by means of renting the property. If that property could have been

rented, then they would have been entitled to the rent in equal shares. I do not see that there is anything there pointing to the actual occupation of it by these parties. If there is nothing pointing to the actual occupation of it then the whole argument fails, and it is not imposed upon them as a condition that they should occupy it, and there is a clear legacy given to Alexander in the fourth clause not cut down by any of the other provisions in the will, so that I do not see how I can get over giving effect to the plaintiff's right as assignee in insolvency of Alexander to that legacy.

Then as to Douglas. Robert and Douglas get two lots of land, Douglas nine and Robert eight, and there are to be some legacies. There is no condition that I see as to Douglas. There is no condition in that fifth clause requiring him to reside upon the property or do anything about it. There is a condition as to Alexander and Duncan aiding and working on the farm, but nothing as to Douglas, so that whatever interest Douglas has in that lot nine will pass to his assignee. Douglas has mortgaged to William, and there is nothing to impeach that mortgage so that William's mortgage will take precedence to any claim that the assignee can have. The assignee's rights will be subject to that mortgage.

I think that is the best conclusion I can draw from the will, that Alexander's legacy is not subject to a condition precedent, and that the assignee takes it, and that Douglas has a right to the property and that that will have to be ascertained in the usual manner, and that Douglas and Alexander are entitled to the rents until the youngest child comes of age.

Usual administration decree to ascertain the interests of Alexander and Douglas in the residue declaring that the legacies are not subject to residence on the farm as a condition precedent. Declaring plaintiff entitled to this land in the tenth paragraph of the bill of Alexander and Douglas, and for the time there specified—an account of the implements in the fifth paragraph to be left with the devisees on giving an undertaking. Reference to the Master at Hamilton to take accounts. Costs of all parties up to the time out of the estate—subsequent costs as well as further directions reserved.

From this judgment the defendants appealed.

The following are the appellants' reasons of appeal:

1. According to the true construction of the will in the pleadings mentioned, it was a condition precedent to Alexander Oliver's being entitled to receive his legacy that he should reside upon the farm until it became due.

2. Even if he were entitled to his legacy, he agreed with the defendants, the appellants, to give up all claim thereto, and if the said agreement was made under a mistake of his rights as held by the learned Vice-Chancellor, his mistake, if any, was a mistake of law, and not of fact, and the Court

ought to have held the plaintiff bound by the said agreement.

3. Upon the faith of it, the defendant Duncan Oliver, remained upon the farm, which he would not otherwise have done, and it is inequitable for the plaintiff now to assert his right to the said legacy.

4. The arrangement entered into between Alexander Oliver and the defendants, the appellants, is a family compromise, and the defendants having altered their position to their disadvantage, upon the faith of such compromise and arrangement, the Court ought to have held the plaintiff bound thereby.

5. Even if Alexander Oliver were entitled to his legacy the same is declared by the will to be a charge upon the use of lots eight and nine, in the said will mentioned, from the years 1872, until the youngest child becomes 21 years of age, and the learned Vice-Chancellor should have so found, and should have directed an account only of the value of such use.

6. If Alexander Oliver was entitled to his legacy the same should have been paid in the year 1877, and the plaintiff is therefore estopped by his delay and laches in commencing to assert his alleged rights.

They relied upon *Pew v. Lefferty*, 16 Gr. 408 ; *Stapilton v. Stapilton*, 1 Atk. 2, *W. & T. Leading Cases*, 4th ed., vol. ii., p. 824, and cases there cited.

The following were the respondent's reasons against the appeal :

1. The decree appealed from is right, and should be upheld for the reasons given by the learned Vice-Chancellor, in the judgment appealed from.

2. The bequest to Alexander Oliver of \$1,600 under the 4th clause of his father's will, is vested and absolute, and the language used in another part of the will has not the effect of making it conditional: *Theobald* on Wills, 2nd ed., p. 407.

3. The appellants failed to establish any such agreement on the part of Alexander Oliver as contended for in the second reason of appeal.

4. The respondent has not been guilty of delay or laches, and is not estopped from asserting his rights, and the appellants cannot now so contend, not having raised such objection by their answers or at the hearing of the cause.

On December 22nd, 1880, the appeal was argued (a).

Moss, Q. C., for the appellants.

J. A. Boyd, Q. C., for the respondents.

The arguments and cases cited sufficiently appear from the reasons for and against the appeal.

November 28, 1881. BURTON, J. A.—We are all agreed that the evidence fails to establish the agreement referred to in the second of the reasons of appeal. The other question, namely, the proper construction of the will, is one of much more difficulty.

It is very inartificially drawn, and is very difficult of construction; but, after much consideration and a perusal of the very able judgment, prepared by my brother Patterson, I am unable to bring myself to the conclusion that the decision appealed against is wrong.

I think it quite possible that the scheme of division referred to by my brother Patterson, which commends itself to one's sense of justice from its perfect fairness, may have been what the testator had in his mind and what the unskilful framer of the will intended to express, and that receives some confirmation from the fact that all parties interested under the will apparently acted upon it on that understanding; but we have to construe the will so as if possible to give effect to the intention of the testator, always bearing in mind that such intention is to be collected from the words he has employed, and that no surmise or conjecture of any object which the testator may be supposed to have had in view can be allowed to have any weight in the construction of his will unless such object can be collected from the plain language of the will itself.

(a) *Present*.—BURTON, PATTERSON, and MORRISON, JJ.A., and BLAKE, V. C.

There is this further rule to be borne in mind, that Courts are never astute to construe a testator's words as importing a condition, if a different meaning can be fairly given to them.

The fourth paragraph of the will gives the legacy of \$1,600 to Alexander unconditionally in the paragraph itself; no reference is made to a condition in any other part of the will, and it is simply a bequest of a legacy, payable to him at a fixed time.

It was no doubt the wish of the testator that all the family, with the exception of Daniel, should reside together on the farm in Onondaga, consisting of two lots, 8 and 9, in the first place until the mortgage on the Brantford farm and other debts were paid, and after the payment of that mortgage he gives, *inter alia*, the use of the Onondaga farm to his wife and six of his children, including Alexander, for their use from that time until the youngest child should become twenty-one years of age, subject to the condition that they unite in paying over to his executors two sums of \$1,600 each, which sums were designed to pay legacies of an equal amount to Alexander and Duncan, which, as I have already indicated, were given to them in the next paragraph of the will, without any conditions expressed.

It was contemplated that the profits of this farm would enable the family to pay off the debts by the year 1872, and after that time they were, subject to the maintenance of the beneficiaries remaining and working it, to be applied to the legacies, in other words the parties named were, if they accepted the bequest, to unite in paying the legacies.

I agree in the view taken by my brother Patterson, that what is meant by the third clause of the will is a personal occupation of the premises, and that any one of the legatees failing to occupy would not be entitled to any portion of the profits, which would belong exclusively to those actually occupying, who would then be bound by the conditions under which the gift was made to them to contribute to the legacies. Any of the parties failing to occupy would forfeit their right to share in the profits, but I see nothing in the

language so far which would extend that forfeiture to the legacies.

Douglas, Robert, and Helen, are named as devisees of this farm, for the term I have named, and bound by accepting the devise to contribute to the two legacies to Alexander and Duncan, but if they had elected not to take the devise *cum onere*, it would scarcely be contended that they forfeited the devises and bequests given to them in a later part of the will.

The construction contended for must then be derived from the combined effect of this and what is said to be part of the condition contained in the 5th clause of the will, which, so far as material, is in these words:

"5th. I give and bequeath unto my sons, Douglas and Robert Oliver, their heirs and assigns, my two lots of land in the Township of Onondaga and County of Brant, composed of Lots Nos. 8 and 9, township aforesaid, to be divided as follows: Douglas Oliver to have Lot No. 9, and Robert Oliver Lot No. 8, Douglas Oliver to pay sister Helen \$400 as above provided, and to his sister Agnes the sum of \$400 as above provided; *and further, that Alexander and Duncan Oliver work on the farm until their legacies become due*, and when the youngest child becomes the age of 21 years Douglas and Robert Oliver each get possession of his lot specified."

It is not very easy to say what is meant here by the words "and further that Alexander and Duncan work on the farm until their legacies become due." It is not in form a condition, and could scarcely be so found where it is, in what purports to be an ultimate devise of the Onondaga farm after the youngest child should have attained its majority. By the previous clause Alexander and Duncan were entitled to occupy the farm not until their legacies became due, but until Douglas and Robert became entitled to the exclusive possession. In the devise to them, the testator charges the devisees with the payment of legacies to two of the daughters; and in the same connection is found the direction in question. I find it very difficult to

say what was meant, but I do not think that I am driven to say that a bequest, clear and unambiguous in terms, is to be defeated because I experience that difficulty.

They are found in a distinct paragraph in the will; a paragraph not in any way professing to deal with this legacy, but professing to devise the farm in two separate portions to two of the other children, and charging them with legacies; and if the paragraph is read alone without reference to the other sections, the words would appear rather to be imposing the further charge of allowing Alexander and Duncan to occupy and work the farm until their legacies were payable.

That the testator desired and expected that the objects of his bounty should reside together on the farm until the youngest child became of age, is, I think, clear; but I cannot say that it has been made clear to me that the bequest to Alexander, which in the portion of the will where it occurs is absolute and unconditional, has been cut down or defeated by anything to be gathered from the general scheme of the will. I do not think that this can be done on a mere conjectural hypothesis of the testator's intention, however reasonable or probable it may appear, unless the words used in the will clearly bear it out. My inclination is to place the same construction upon the will as the Vice-Chancellor has done; and I am certainly not prepared to say that it is wrong.

I think, therefore, that this appeal should be dismissed, with costs.

PATTERSON, J. A.—The question which the learned Vice-Chancellor decided, with some hesitation, in favour of the plaintiff, is, whether the legacy of \$1,600 to Alexander Oliver is payable to Alexander, or rather to the plaintiff as his assignee in insolvency, for Alexander himself never claimed it, notwithstanding that Alexander elected not to work on the farm, but left it in order to follow some mercantile pursuit, six years before 1877, and a year before the mortgage on the Brantford farm was paid off.

The will is so inartificially drawn that it can be no matter of surprise to find different views taken of its meaning. For my own part I interpret it as making the right to the legacy expressly conditional on the legatees continuing to work on the farm till the legacy was payable, viz, till, 1st January, 1877.

I do not trouble myself to answer a question suggested by counsel in the course of the argument, What if he became unable to work? The facts do not require me to do so, or to speculate upon what amount of work or willingness to work would satisfy the condition. It was the deliberate choice of the legatee to do for himself elsewhere, even at the cost of losing the legacy; and therefore the plain data before us are that the testator desired a certain thing to be done, and that thing the legatee decided not to do.

The testator had two farms, one of which was at the Ox Bow Bend of the Grand River in the township of Brantford, and the other in the township of Onondaga.

In his will he expresses his desire that all his family, except his son Daniel, should remain united one and all, as at the date of his will, until the mortgage on the Brantford farm should be paid, and also his other debts. Then he proceeds to dispose of the rest and residue of his property after the debts and mortgages are paid. He bequeaths a legacy to Daniel, and one to each of his daughters Flora and Mary. Then he devises the Brantford farm to his sons Thomas and William, charged with those three legacies; and then, in the 3rd, 4th, and 5th paragraphs, he deals with the Onondaga farm and the personal property.

Before explaining my view of what is meant in these paragraphs, I may remark that, one thing which seems to have struck the Vice-Chancellor as rather throwing on the defendants the onus of clearing up the obscure passages, and which was pressed in the same way upon us, does not appear to me to have the force attributed to it. It is urged that the fourth paragraph contains a direct bequest

of the \$1600, and that something equally direct must be found to qualify it or render it conditional. I cannot assent to that. We are not at liberty to separate that paragraph from the context, and to read it as if it stood alone. So read, it would give legacies payable out of the personal estate, or out of the estate generally, when it is manifest that they were charged on the Onondaga property; and, whether chargeable on any part of the personal estate or not, they were certainly not chargeable on the shares intended for Thomas or William. The bill is framed on a more correct apprehension of the matter, for it asks to have the money made out of the Onondaga lands alone, and to do that we must go outside of the fourth paragraph.

By the third paragraph all the rest and residue of the estate, real, personal and mixed, is given to seven persons, viz: the wife, four sons and two daughters; and this is described as the two lots in Onondaga, and the personal property, except one-third of the stock on both farms, which goes to Thomas and William. If the devise had stopped here the seven would clearly have taken share and share alike. That, however, was not the testator's design; and he therefore goes on to indicate what he means. We find that all the land and all the chattels are ultimately intended for two of the seven, viz., Duncan and Robert, but the others are to get their shares; the wife, by the use of the dwelling house and furniture and an annuity, and the other four by money payments. The last instalment was to fall due on the mortgage in 1872. The testator keeps this in view, and keeps also in view what he had said before respecting the family keeping together till it was paid. In connection with this it is worth while noting that the personal property, which seems to have been chiefly the stock on the farms, for the distribution of which he provides, was the property as it should be found in 1872, when the joint occupation was to cease, not necessarily as it was at the testator's decease. He proceeds to make further provision for the devisees of the Onondaga lots remaining together until the youngest child should attain twenty-one, which

would be in 1885. When he says, "and this bequest shall be made when the mortgage on my farm on Ox Bow Bend shall be fully paid: to have and to hold the same for their use from the year 1872 until the youngest child becomes twenty-one years of age," I understand him to contemplate the personal occupation of the homestead, as all the indications of the will, as well as what one knows of the mode of life and the ideas of people in the position of the testator, are opposed to the notion that he ever thought of the place being rented. It may be that, if it had become desirable to rent the farm, and there had been any one who could make a lease of it, such a mode of enjoyment would have satisfied the words of the will. I take it that this is rather a permission than an injunction, and that it is a permission to *live on the place*, and gives no right to any one who leaves it to demand from those who remain any contribution towards his or her support elsewhere. Then follows what strikes me as especially important: *Subject to the following conditions, viz., that they unite in paying over to my executors on or before the 1st of January, 1877, the sum of \$1600, and also the sum of \$1600 on or before the 1st of January, 1882; said sums to pay Alexander and Duncan Oliver's shares as herein provided for.*" Who were those that were thus to unite in providing for the *shares* of Alexander and Duncan? Plainly all the seven, including Alexander and Duncan themselves.

The mortgage was to be paid by the profits of the two farms; and all the family were to keep together, and those old enough to work were expected, whether it is put down in so many words or not, to work together for the common benefit till the mortgage was paid. When that had been achieved, then the seven persons interested in the Onondaga farm were in like manner to work together upon it till the two sums of \$1,600 each had been laid by. That is expressly made a condition of the devise. It is true that, looking at the words only in connection with their immediate context, they might seem to make it merely a condition of having the use of the farm from 1872 till 1885.

I do not think that would be a fair reading of the passage. If the use of the farm during the thirteen years is imposed as a command, the condition is inappropriate. But taking it to be a permission, I do not see that we are obliged to treat the condition as confined to the right to enjoy the place during that limited period; or why it may not well be understood as attached to the whole interest devised. The precise application of it is not, however, of direct consequence to our present inquiry, except so far as it touches Alexander; and as to him it derives point from what follows, while it in its turn throws light on what might otherwise be obscure.

The fourth paragraph recurs to the sums which are sometimes called legacies, and sometimes *shares*, the latter word expressing best what the testator meant when in terms he made the devise of the property to the seven.

The third paragraph had directed the payment of the two sums of \$1,600 to the *executors*; the fourth now designates the times at which those sums are to be paid to Alexander and Duncan, and the sums of \$400 each to the daughters, Helen and Agnes.

Then the fifth paragraph devises one of the lots to Douglas, charged with the two legacies of \$400; and the other to Robert, charged with the annuity to the widow, who was to live in the dwelling house on Robert's lot. The devisees were not to have separate possession until the youngest child was of age; and none of the legacies were payable till after that period, except those to Alexander and Duncan. Those were the two which the seven devisees were to unite in paying; and to make it more clear that the condition included the legatees themselves, as well as to shew how they were to unite in making the money, it is added: "And further, that Alexander and Duncan work on the farm until their legacies become due." I take this direction in connection with what is said at the end of the third paragraph, each passage being explanatory of the other, and the two together making, in express terms and not by implication, the

working on the farm, and in that way contributing to the payment of the legacy, a condition of the right to receive it.

We are told that when Alexander left home in 1871 he was nineteen years of age; in 1877 he would have been twenty-four or twenty-five; Duncan would be about the same age in 1882, when his legacy should be payable. The will was made in February, 1869, a few days or hours only before the testator's death. William and Thomas, who were older than Alexander, continued to work, William managing one farm and Thomas the other, till the mortgage was paid off in 1872. Then they left home, and Alexander was the only remaining son old enough to be of much service. His leaving is spoken of as having caused inconvenience and loss, and it must have thrown on his mother and the younger children a good deal of care and responsibility, which his father intended him to assume. The provisions of the will, though wanting in definiteness as they are expressed, were evidently carefully considered with reference to the circumstances of the family. I see no room to doubt that the wishes of the testator and his intentions would be disappointed by appropriating to Alexander so large a share of the farm or its produce as would be represented by \$1600 without his having aided in the accumulation of the general fund by the seven or eight years' work directed by the will. That was the opinion entertained by himself when he was leaving, as well as by the other members of the family and by Mr. Macdonald, who gave evidence at the hearing. I am satisfied their view was the correct one, and I am pleased to be able to sustain it by what seems to me the true interpretation of the will.

I think this appeal should be allowed, with costs, and the decree varied accordingly.

MORRISON, J.A., and BLAKE, V.C., concurred with BURTON, J. A.

Appeal dismissed (a).

(a) Reversed on appeal to the Supreme Court, not yet reported.

WATSON V. LINDSAY ET AL.

Unpatented lands—Mortgage—Sale under power—Patent—Statute of Limitations.

C., being the locatee of the Crown, in 1860, mortgaged the north-half and the south-half of the land by two mortgages to McM. In 1865 he died. In 1870 and 1874, McM. assigned the mortgages respectively to D. In 1875 the patent of the north-half issued to one Campbell, who paid the purchase money due to the Crown on the whole lot, at the request of M. and A., the widow and son of C., and the patents of the east and west halves of the south-half, issued to M. and A. respectively, without any intention (as shewn by the memorandum in the Crown Lands Department) to cut out the right, if any, of D. under his mortgage. In 1876, D., under the power in his mortgages, sold to L., who, in 1876, made a mortgage to the plaintiff, on which this suit was brought. M. and A. had, in the meantime, always occupied the land without paying principal or interest, and they claimed title by possession.

Held, affirming the judgment of the Court of Chancery, reported in 27 Grant 253, that M. and A. had, under the Statute of Limitations, acquired a title by possession.

THIS was an appeal by the plaintiff and one of the defendants, McGee, from the Court of Chancery. The judgment is reported in 27 Grant 253, where, as also in the judgment of Patterson, J.A., the facts are fully stated.

On January 20th, 1881, the appeal was argued (a).

Davidson Black and *Wellington Francis*, for the appellants. The decree, as varied by the Court below on rehearing, is erroneous, and the original decree made in this cause was correct, and should be affirmed. Donald A. Cameron, in the pleadings mentioned, was merely the nominee of the Crown, to whom the privilege of pre-emption had been conditionally granted. He could not create a valid lien upon the land in question, so long as the fee remained in the Crown, and the registration of his mortgage to Angus R. McMillan had not that effect. Such mortgage for the first time became a charge on the land on the 30th day of April, 1875, when the Letters Patent issued to the respondents, and the Statute of Limitations from that time only began to run against the

(a) *Present*.—BURTON, PATTERSON, and MORRISON, JJ.A., and OSLER, J.

appellants' title. The time did not commence to run in favour of the respondents so long as the title was vested in the Crown. The evidence shows that the respondents accepted the grants from the Crown subject to the rights of those claiming under the said mortgage to Angus R. McMillan. They also relied on the judgment of Spragge, C. They referred to R. S. O. ch. 25, sec. 26; R. S. O. ch. 111, sec. 78; *Holland v. Moore*, 12 Gr. 296; *Vance v. Cummings*, 13 Gr. 25; *Jamieson v. Harker*, 18 U. C. R. 590; *Dowsett v. Cox*, 18 U. C. R. 594.

J. K. Kerr, Q. C., and *Beck*, for the respondents. The decree as varied by the order on rehearing is correct, and the original decree is erroneous. A mortgage incumbrance or lien operating as a charge upon lands pursuant to the provisions of R. S. O. ch. 25, sec. 26, has "the same force and effect as if letters patent for the said lands had before the execution of such instrument been issued in favour of such grantor." The mortgage from D. A. Cameron to McMillan in the bill mentioned, if a charge under the above section, operates as a charge from the date of its execution, and the Statute of Limitations would run as against the mortgagee from the time of the execution thereof. The Statutes of Limitations can be relied on by the Crown and all persons claiming under the Crown. The respondents claim title under the Crown, and the cases cited by the appellants therefore do not apply. The Statute of Limitations runs in all cases, whether patent issued or not, excepting as against the Crown itself, or where, if it operated, it would affect the rights of the Crown. The only case, therefore, in which the Statute would not run is in favour of a squatter as against the Crown or licencees or patentees under it. The exercise of a power of sale contained in a mortgage does not operate in any way as an acknowledgment of title, nor is in the nature of legal proceedings so as to create a fresh starting point for the Statute of Limitations. The purchaser under the power of sale claims solely under and derives his title solely from the mortgagee, and could be in no better position than he. The evidence of the ruling of

the commissioner is inadmissible for the purpose of varying the patents, which are absolute in form, and the appellants can in no case succeed without first setting aside the patents, which they have not attempted to do. The patents are absolute in form, and the ruling of the commissioner is not admissible in evidence so as to make the respondents take subject to any incumbrance which would not otherwise affect their title, but, even if admissible, it was not intended by the ruling to create any further legal liability than what if any already existed. The evidence does not shew either that Donald A. Cameron was the "Original Nominee" of the Crown or that the respondents obtained patents of the lands in question under R. S. O. ch. 25, by virtue of any claim derived through Donald A. Cameron, and therefore the mortgage of Donald A. Cameron never was a charge on the lands, and the case of *Vance v. Cummings*, 13 Gr. 25, has no application. The respondents are entitled to the lands in question under a title prior to any title derived under the mortgage from Donald A. Cameron by virtue of the sheriff's deed: *Yale v. Tollerton*, 13 Gr. 202; *Ferguson v. Ferguson*, 16 Gr. 309. They further relied on the reasons set out in the judgment of Blake, V. C., on the re-hearing of this cause in the Court below.

Davidson Black, in reply.

November 28, 1881. PATTERSON, J. A.—This appeal is by the plaintiff and the defendant McGee, who are dissatisfied with the decision of the majority of the Court of Chancery on the rehearing of the case.

The bill is filed by the plaintiff as mortgagee of lot 17 in the 2nd concession of the township of Finch, and asks for payment of the mortgage money by Lindsay, the mortgagor, or a sale of the land. The other defendants are Dickenson, the owner of the equity of redemption under a deed from Lindsay; McGee a second mortgagee under a mortgage made by Lindsay; Mary Cameron, the widow of the original locatee of the Crown, and patentee of one-half of the south half of the lot; Angus Cameron,

one of the sons of the locatee, and patentee of the other half of the south half; and Campbell, who paid the purchase money for the whole lot, and is patentee of the north half of it.

Donald A. Cameron, the locatee, died in 1865, without having paid for the land. In 1860, he had made two mortgages to one McMillan, one being of the north half of the lot, and one being of the south half, which mortgages were both promptly registered. The defendant Dickenson became assignee of the mortgage upon the south half in 1870, and of that upon the north half in 1874. In 1876, he sold the whole lot, under the powers of sale contained in the mortgages, to the defendant Lindsay, and Lindsay in 1877 made the mortgages to the plaintiff and to the defendant McGee, and reconveyed the equity of redemption to Dickenson.

The patents issued in 1875 under the following circumstances:

In 1857 a *fi. fa.* lands had issued on a judgment against D. A. Cameron, and in 1862 his interest in lot 17 was sold by the sheriff under a *ven. ex.*, and was purchased by one MacLennan. The patent not having issued for the land, that sale was inoperative in law to pass any interest to MacLennan, although it might have formed a ground for a decree in equity, to compel Cameron to assign his right as locatee to the purchaser: *Yale v. Tollerton*, 13 Gr. 302; *Ferguson v. Ferguson*, 16 Gr. 309. It will be observed that while the *fi. fa.* is said to have issued in 1857, before the date of the mortgages to McMillan, which was 24th April, 1860, and before the right of Cameron to purchase was admitted by the Crown Lands Department, which, as appears from a mem. to which I have to refer, was on 14th April, 1860, the sale was not until 1862. If the subject of the sheriff's sale and of the mortgages had been the legal estate in the land, it would have been important in a contest between the mortgagee and the purchaser under the *fi. fa.* to know whether or not the writ was in the hands of the sheriff to be executed at the date of the mortgage,

and had remained there until the sale; because without this information it would not appear whether or not the lands were, at the making of the mortgage, bound by the judgment and writ. We do not see from the evidence how this was; and under the circumstances, I do not know that we are interested in knowing.

The sheriff's sale seems to have been treated as passing some interest in the land, for Mrs. Cameron and Angus, after the death of Donald, obtained from Maclellan a conveyance of his right under it. They also arranged with Campbell that he should pay the Crown Lands Department the amount due for the whole lot, in consideration of his receiving for himself the north half of it. He accordingly paid the money; the patent for the north half issued to him, and the patents for the east and west halves of the south halves issued to Mary and Angus Cameron respectively. A copy of the ruling of the Commissioner of Crown Lands respecting the application for the patents for the south half bearing date 5th June, 1874, is in evidence, and is in these words:—

“MEMO.—The right of Donald A. Cameron to purchase the lot No. 17 in the 2nd concession of the township of Finch, was admitted 14th April, 1860. No purchase was however effected by him.

“It being stated that Dr. Dickenson is assignee of mortgages given by the above named Donald A. Cameron, which mortgages are registered against the lot in the County Registry Office, it is to be understood that the sales of the west half and east half, made respectively in the names of Mary Cameron and Angus Cameron, widow and son of the said Donald A. Cameron, are not intended to cut out the rights (if any) that Dr. Dickenson may have as such mortgagee.”

Mary and Angus Cameron both depose that they founded their application for the patents on the title they derived from Maclellan. It does not appear that that title would, apart from their relationship to the locatee, have been accepted.

The case was heard before Spragge, C., who held that the mortgages to McMillan and the sale under them by Dickenson were operative to pass the title to Lindsay, and that the mortgages made by Lindsay to the plaintiff and McGee, and his conveyance of the equity of redemption to Dickenson were also good; and that those claiming through the sale under the mortgages were entitled, as against the Camerons, to the south half of the lot; and as against Campbell to the north half, provided they recouped to him the purchase money for the whole lot, which he had paid.

The Camerons, besides relying upon whatever defence arose upon the facts which I have stated, relied also upon the Statute of Limitations and their uninterrupted possession of the land. The learned Chancellor was against them in this as well as the other branches of their defence. Upon the re-hearing, the Vice-Chancellors took a different view of the effect of the statute, and considered that the Camerons were entitled to have the bill dismissed as against them.

The appellants are dissatisfied with that variation of the decree.

This bill is filed upon the mortgage of 1877, from Lindsay to the plaintiff; but, for the purpose of the defence of the Camerons, we have to consider the rights which arose under the mortgage of 24th April, 1860, from D. A. Cameron to McMillan. I have looked in vain through the materials supplied in the appeal book for information as to when a right of entry accrued to the mortgagee. The date of the mortgage is stated in the bill; but the other facts which are of some importance when the statute of limitations is in question, such as when the debt was payable, whether the mortgagor was entitled to retain possession until default, whether any payment of principal or interest was made, and, if made, when, are not told us either on the pleadings or by any evidence before this Court. I infer that there was default in payment from the fact that the mortgagee sold, but I have nothing before me to shew when the default occurred. In the absence of direct information, I dare say I shall be right in assuming that a right

of entry accrued to the mortgagee, as between him and the mortgagor, before the death of the latter in 1865, and that therefore the statute had begun to run in favour of D. A. Cameron in his lifetime. It continued to run in favour of the present defendants, Mary and Angus Cameron, who continued in possession of the land. This bill was filed on 3rd June, 1878. The statutory ten years, therefore, reached back only to 3rd June, 1868, three years after the death of D. A. Cameron, which makes it unimportant whether the right of entry accrued in his life-time or not, provided it was before this date.

Why should not the rule which bars a mortgagee after ten years from the accrual of his right of entry, or from the last payment on account of principal or interest (R. S. O. ch. 108, sec. 5, sub-sec. 3, and sec. 22), apply as against the plaintiff, who is asserting a title derived under McMillan, the original mortgagee? The answer given to this question is, that the estate was in the Crown until 1875, when it was granted to these defendants. If it had been granted to the plaintiff, it is clear that no possession could have been set up against him, even though ten or twenty years possession had run before the grant. The Crown not being barred by the statute, its grantee could assert the same right of entry which the Crown possessed. That is the law on which the cases of *Jamieson v. Harker*, 18 U. C. R. 590, and *Dowsett v. Cox* 18 U. C. R. 594, proceeded. The important difference here is, that the patent was not to the plaintiff, but to the defendants. The Crown, having the right as against both plaintiff and defendants, grants that right to the defendants; whereupon the argument for the plaintiff seems to me to involve propositions like these:—Had no patent issued, I could not have disturbed the defendants, because my right, which was only the right conveyed by the mortgage made by D. A. Cameron to McMillan, would have been barred by the limitation of ten years: The defendants, by force of the statute, could have held the land against me, my right

having been (under sec. 15) extinguished: The Crown, however, retained the ownership and right of entry as against both me and the defendants: The Crown has granted me no new right, but has granted its title to the defendants: therefore I can now eject the defendants. This conclusion, from these premises, is an obvious absurdity.

Are there any other facts to aid the plaintiff? The memorandum in the Crown Lands Department I understand, as it was understood in the Court below, simply to recognize, without enlarging, the rights of the mortgagee under whom the plaintiff claims. Taking it to prove the terms on which the estate was accepted by the defendants, those terms were not, as I apprehend the memorandum, more than an assent to recognize the mortgage made before the patent as being as valid as if the patent had issued when it was made. In one view of the matter, which was alluded to by one of the Vice-Chancellors in the Court below, viz., the operation of the mortgage by way of estoppel, the result would, I think, be the same. Not having the mortgage before me, I do not venture to say how far it would have estopped the mortgagor from denying that he was seized in fee. Assuming, however, that it had that effect, and that the fee when acquired would have fed the estoppel, and converted what was an estate by conclusion of law into an estate in interest, we should have to guard ourselves from confusing the operation of the estoppel with regard to the estate itself, and its operation with regard to the mortgagor. The mortgagor was always estopped. He could not assert that the mortgagee only acquired the fee when the patent issued, being estopped from denying that he always had it. On this ground the mortgagor, if his deed were one which created an estoppel, could never have set up the outstanding estate in the Crown or its acquisition by himself. I make these remarks without inquiring how far these defendants are in such privity with D. A. Cameron as to be bound by any estoppel created by him, and quite aware that any such question could only be important in circum-

stances the converse of those before us, namely, when the estoppel was set up against the person estopped, not where it was relied on as working in his favour.

Some arguments appear to have been based in the Court below upon the fact that Dickenson had sold the lands under the power of sale in the mortgage. I do not think it was urged before us that that circumstance affected the running of the statute. I take it that the vendee under that sale took only the estate which Dickenson had, that is to say, the legal estate, or what we may describe as the legal estate, namely, the estate, whatever it was, that was conveyed by the mortgage deed. He took it, of course, freed from the equity of redemption, and no longer held as mortgagee; but the estate which he took, and the estate which had been held by McMillan and Dickenson, was that against which the statute was running in favour of the defendants.

I have said nothing on the subject of the clause in the Heir and Devisee Commission Act, R. S. O. ch. 25 sec. 26, which relates to mortgages made before the patent issued. I do not think the defendants before us require to resort to it, and I prefer not expressing any decided opinion as to its effect. There are two particulars which I should like to hear more fully discussed than they were before us. One is that which, as pointed out by Mowat, V. C., in *Vance v. Cummings*, 13 Gr. 25, apparently confines the effect of the section to cases where the patent should be issued in pursuance of a decision by the commissioners. The other, which may scarcely be indicated by anything in the present case, is the effect of the power given to register such a mortgage. From the language used it is not clear that registration *before* the issue of the patent is authorized. Under our former registry laws a conveyance, either by way of mortgage or absolutely, was only authorized to be registered *after* patent issued. This was seemingly overlooked in *Vance v. Cummings*, when it was held that the registration of a mortgage before patent was, under C. S. U. C. ch. 89, sec. 47, notice of the mortgage to a

subsequent purchaser. The present registry law I believe permits registration of all instruments affecting land whether patented or unpatented; hence the reference to registration in this clause may perhaps have no longer any practical effect. On the whole, while the provision may possibly aid the defendants, it cannot in any view injure them.

I agree with the conclusion that the defence under the statute is made out, and that we should dismiss this appeal, with costs.

OSLER, J.—The plaintiff's counsel were obliged to admit that as between mortgagee and mortgagor the Statute of Limitations was running against the former before the patent issued, so that if the full period had elapsed before that event happened, the plaintiff would have been without remedy.

If indeed the patent had been issued to the plaintiff, the mortgagee, the possession of the mortgagor would have been of no avail to the latter, as he could not, have been acquiring a title by possession against the Crown or the grantee of the Crown: *Jamieson v. Harker*, 18 U. C. R. 590; *Dowsett v. Cox*, 18 U. C. R. 594; *Regina v. Wismer*, 6 U. C. R. 293; *Jackson v. Vail*, 7 Wend. 125; *Chiles v. Calk*, 4 Bibb (Ky.) 554.

The land, however, was granted to the person in possession, the representative of the mortgagor, in whose favour the statute was admittedly running. On what principle then can that avoid the statute?

The mortgage, as appears from the instrument itself, which has been handed in since the argument, is the ordinary mortgage in fee with absolute covenants for title, and as against the mortgagor and those in privity with him, the mortgagee had the title in fee by estoppel, which he could at any time have enforced by foreclosure or ejectment: *Doe dem. Irvine v. Webster*, 2 U. C. R. 224; *Thomas v. Hatch*, 3 Sumner, Circuit Ct. U. S. 170, 182.

If, on the issue of the patent to the defendant Cameron,

the plaintiff's title, which before depended upon the estoppel, became good in interest, still he derived no new estate or right of entry which could serve as a new starting point for the statute. If, on the other hand, the patent did not feed the estoppel by reason of the patentee not being in privity with the mortgagor, it merely cut out the mortgage altogether, while, if the memorandum of the Commissioner of Crown Lands only had the effect of leaving matters *in statu quo*, the plaintiff was in no better position than if the patent had operated in his favour. Either way the statute is not interrupted, and the plaintiff must fail.

I express no opinion as to the effect of the 26th section of the Heir and Devisee Act, R. S. O. ch. 25.

I think the appeal should be dismissed.

BURTON and MORRISON, JJ. A., concurred.

Appeal dismissed.

CALVERT V. BURNHAM.

Agreement to lend money—Specific performance—Cloud on title—Demurrer.

A bill alleged that a mortgage was executed by W. to the defendant, in consideration of \$450 : that the defendant advanced only \$150 thereon, and W., being entitled to receive the balance, assigned such right and conveyed his equity of redemption to the plaintiff : that the defendant refused to pay the balance, and claimed to hold the mortgage as security for \$450. The prayer was for specific performance, or, in the alternative, a declaration of the above facts, and for general relief. At the hearing the learned Judge allowed a demurrer *ore tenus*, on the ground that an agreement to lend money could not be specifically performed.

Held, reversing this judgment, that upon the facts alleged in the bill, namely, that the mortgage was being held for more than had been advanced thereon and therefore, to that extent, formed a cloud on the title, the plaintiff would be entitled to a declaration to that effect, and appropriate relief ; and as the demurrer admitted the truth of the allegation, it should have been overruled.

THIS was an appeal from the judgment of Proudfoot V.C., dismissing the plaintiff's bill herein, on a demurrer thereto. The pleadings, so far as material, are set out in the judgment of this Court. The learned Vice-Chancellor delivered the following judgment :

PROUDFOOT, V. C.—“ My impression is that the bill in its present shape is not maintainable. There are cases in *Beavan's Reports* where, upon a person agreeing to advance money on mortgage, and finding it not convenient to carry out the agreement, a bill was filed for the specific performance of the agreement, and the relief was refused, the Court there holding that the remedy, if any at all, was for damages the plaintiff might have sustained by non-fulfilment of the agreement. The bill here is not filed for damages. If it had been I suppose we could have entertained the matter here.

“ Bill dismissed.

“ No evidence need be taken. The case can of course be reheard without it.”

From this judgment the plaintiff appealed.

The following were the reasons of appeal :

1. The plaintiff is entitled to a declaration from the Court, which he might register, shewing the amount actually advanced by the defendant upon the mortgage in question, in order to prevent the defendant from assigning the mortgage to an innocent purchaser for value, who might avail himself of the provisions of sec. 8, ch. 95, of the R. S. O.

2. The plaintiff would also be entitled to an injunction preventing the defendant from assigning the said mortgage to any such purchaser, and this relief is of a kind that might, if necessary, be granted at the hearing by the Court under the prayer for general relief contained in the bill : *Phillips v. Royal Niagara Hotel Co.*, 25 Gr. 358 ; *Cockerell v. Dickens*, 3 Moo. P. C. 98.

3. The effect of the decree is, to hold that a mortgagee who has advanced no money is entitled to claim that until the time mentioned for payment in the mortgage has arrived he can retain the mortgage undischarged, and thereby create a cloud upon the title of the mortgagor, and the mortgagor, or those claiming under him, may be thus precluded from procuring money from other sources upon the security of the lands.

4. The defendant having accepted the mortgage in question and having retained the same, is bound to perform his part of the agreement upon which the mortgage was given, and advance the whole of the mortgage money.

5. The decree was made at the hearing upon an objection raised by the defendant as upon a demurrer. The appellant submits that at the hearing the Court ought to have looked at the answer as well as at the bill and considered the whole case as presented upon the pleadings ; and it was apparent upon the pleadings that the question between the parties was whether or not as a matter of fact the whole of the money had been advanced by the defendant as mortgagee, and the Court should have determined that question.

6. In any case the defendant ought not to have been allowed any costs, or at all events he should only have been allowed such costs as he would have been entitled to if he

had demurred to the bill: *Gildersleeve v. Cowan*, 25 Gr. 460, and cases there cited.

The following were the reasons against the appeal:

1. No authority can be cited for such a bill, and the cases are against any such suit being entertained.

2. It is admitted that \$150 was advanced upon the security of the said mortgage, and that the time for payment thereof had not arrived, and therefore no suit for redemption can be maintained.

3. The bill does not shew that the plaintiff has sustained any damage, because the whole sum was not advanced as alleged, and there is no privity between him and the defendant which would entitle him to sue for and recover damages even if a case were made for such relief.

4. No such bill will lie to enforce the specific payment of money, as is here sought: *Rogers v. Challis*, 27 Beav. 175; *Sichel v. Mosenthal*, 30 Beav. 371.

5. The mortgage in question is only a security for so much as was advanced upon it, and it requires no declaration of the Court to certify this. The suggested danger of the transference of the mortgage to a purchaser for value without notice, who might claim to recover the whole sum, is unfounded, as every assignee of a mortgage takes it subject to the state of accounts between the original parties: *Judd v. Green*, 33 L. T. N. S. 597; *Martin v. Bearman*, 45 U. C. R. 205, 211; *Pressey v. Trotter*, 26 Gr. 154.

6. This case is not one of the class in which this Court entertains jurisdiction for the purpose of granting declaratory decrees, as by his own shewing the plaintiff is not entitled to any consequential relief: *Murphy v. Murphy*, 20 Gr. 575; *Rooke v. Lord Kensington*, 2 K. & J. 753; *Cogswell v. Sugden*, 24 Gr. 474.

7. The answer herein submits that the plaintiff shews no equity entitling him to relief, and the learned Vice-Chancellor properly disposed of the case by refusing to administer any relief.

8. As to the complaint about costs, no question was raised at the hearing or on settling the minutes as to the costs being

only those of a demurrer. As a matter of fact the Master has, under the powers given to him by General Orders No. 306 and 308, only taxed the costs of a demurrer, so that this ground of appeal only involves an imaginary grievance. At all events it was a matter for the discretion of the Judge as to the awarding of costs, from which there is no appeal: *Pearce v. Watts*, L. R. 20 Eq. 492; *Rich v. Trowbridge Water Works*, L. R. 10 Ch. Ap. 459; *Shaw v. Lawless*, 5 Cl. & F. 129.

On May 20th, 1881, the appeal was argued (a).
Bethune, Q.C., and *Poussette*, for the appellants.
E. Blake, Q.C., for the respondent.

The arguments and cases cited sufficiently appear from the reasons for and against appeal.

November 28, 1881. SPRAGGE, C. J. O.—A mortgage dated the 17th August, 1878, was executed by one Webb to the defendant, purporting to be made in consideration of \$450, and to be made to secure payment of that sum.

The bill alleges that the defendant paid to Webb the sum of \$150, part of the agreed consideration mentioned in the mortgage, and that Webb became entitled to receive, but has not received the balance: that Webb has conveyed to the plaintiff the land mortgaged, subject to the payment of \$150 and interest, and has assigned to him the \$300 remaining unadvanced, and the right to receive the same: that the plaintiff has demanded the same from the defendant, who has refused to pay the same; that the principal sum secured by the mortgage not having accrued due, he cannot file a bill to redeem; but he claims that he is entitled to receive from the defendant the sum of \$300 not advanced, or to have it declared that the mortgage is a security only for \$150 and interest; and the specific prayer is in the alternative, that he may be paid the \$300 and in-

(a) *Present*.—SPRAGGE, C. J. O., BURTON, PATTERSON, and MORRISON, JJ. A.

terest, or for the declaratory decree he claims to be entitled to; and there is the usual prayer for general relief.

The answer takes issue upon the fact of the advance of the mortgage money, and alleges that the whole sum of \$450 was advanced by the defendant to one Frederick E. Burnham, a son of the defendant, who was the authorized agent of Webb in the matter of the loan and mortgage.

The issue was a very simple one; but when the cause came on for hearing, counsel for the defendant, instead of proceeding with the trial of the issue, demurred *ore tenus*; and the demurrer was allowed by the learned Judge before whom the cause was heard, and the bill was dismissed. This appeal is from that decision.

The learned Judge appears to have proceeded upon "cases in Beavan's Reports," the same probably as are referred to in the defendant's reasons against the appeal. One of these is the case of *Rogers v. Challis*, 27 Beav. 175, in which the bill was filed upon an alleged agreement by the defendant to borrow £1000 from the plaintiff upon the security of certain personalty; a guaranty against its removal, and the deposit of a lease; and of this agreement, specific performance was prayed. Sir John Romilly held that it was not a case for specific performance; and commented upon the difficulty and danger of the task which the Court would have to perform if it were to investigate cases of that description. He observed that the Court grants specific performance only in cases where the remedy at law is inadequate; that the matter before him not shewing a proper case for specific performance, Sir Hugh Cairns's Act did not apply; and that it was a proper matter for the determination of a Court of law.

Another case reported in *Beavan*, is *Sichel v. Mosenthal*, 30 Beav. 371. The bill was for specific performance of an agreement by the defendant to enter into a partnership with the plaintiffs on a future day; and in case he failed to do so, to lend them a certain sum of money for two years. Sir John Romilly pointed out several objections to enforcing the specific performance of such an

agreement; and held that it was a proper case for an action at law. He added, what I suppose is relied upon for the defendant: "It would be quite new to me to hear that this Court could specifically enforce a contract to lend money."

It is to be observed that in neither of these cases was a mortgage given upon the plaintiff's property. It could indeed have been given only in the later case. Nor was any instrument executed by the plaintiff charging his property in any way; no instrument in fact other than the instrument of contract of which he sought specific performance; and this is one material distinction between the cases cited, and the case before us.

In the cases cited, the Master of the Rolls held that the Court had no jurisdiction. It is obvious that since the passing of the Administration of Justice Act, this would not be an objection here. It could only be a reason for *sending* the case to law; not that the Court of Chancery had not jurisdiction; but that the cause could for some reason be more conveniently, expeditiously, or inexpensively carried on or dealt with in a Court of law.

The difficulty here is, so far as it is any difficulty upon that head, that the bill is not framed, nor does the prayer ask for any thing that, at the date of this cause being heard, was cognizable in a Court of law. All that a Court of law could then do was to give damages; and the bill is not framed for relief of that nature.

If, however, upon the bill as framed relief of any kind could properly be given in equity, the demurrer should not have been allowed. Upon the demurrer, the facts alleged in the bill are of course to be taken to be true. It is then to be taken to be a fact that the defendant holds a mortgage upon land of the plaintiff expressed to be given in consideration of \$450, and redeemable only on payment of that sum; and claims to be entitled to that sum; while in fact he advanced only the sum of \$150, and refuses to accept that sum with interest in repayment. The mortgage then purports upon the face of it to be, and the

defendant claims it to be, an encumbrance upon the land to the extent of \$450, while upon the true facts of the case, it ought to be an incumbrance only to the extent of \$150.

The plaintiff, in his reasons of appeal, puts as one of his grounds that such a mortgage is a cloud upon the title of the mortgagor; who may be thereby precluded from procuring loans from other sources upon the security of the land. I think this reason is a sound one.

Mr. Justice Story treating upon this head of equity, says, in his *Equity Jurisprudence*, 12th ed., sec. 700, p. 683 :

The decisions upon the point, "are founded on the true principles of equity jurisprudence, which is not merely remedial, but is also preventive of injustice. If an instrument ought not to be used or enforced, it is against conscience for the party holding it to retain it, since he can only retain it for some sinister purpose. If it is a negotiable instrument, it may be used for a fraudulent or improper purpose to the injury of a third person. If it is a deed purporting to convey lands or other hereditaments, its existence in an uncanceled state necessarily has a tendency to throw a cloud upon the title. If it is a mere written agreement, solemn or otherwise, still, while it exists, it is always liable to be applied to improper purposes, and it may be vexatiously litigated at a distance of time, when the proper evidence to repel the claim may have been lost, or obscured; or when the other party may be disabled from contesting its validity with as much ability and force as he can contest it at the present moment."

The reasons given by Judge Story in the passage that I have quoted, apply with much force to the position of these parties; and if section eight of the Revised Statutes, ch. 95, is to be interpreted in the way contended for by Mr. Bethune, the position of the mortgagor is obviously one of danger. Without saying that Mr. Bethune's is the proper interpretation, it need only be said that even a doubt whether that interpretation may not be the proper one,

would render the existence of this mortgage a heavier cloud upon the title of the plaintiff than it otherwise would be.

I do not feel pressed by the argument that what is asked for by the alternative prayer of the bill is only declaratory, and that the Court will make no declaration as to the equities of a plaintiff, unless a case is made for consequential relief. This prayer is followed by the prayer for general relief. If, therefore, there is ground for holding that the dealing with this mortgage by the defendant, as he is alleged to be dealing with it, holding it and claiming it to be a valid mortgage for \$450, constitutes it a cloud upon the plaintiff's title, the plaintiff is entitled under the prayer for general relief to some direction from the Court in regard to it, in order to its ceasing to be a cloud upon the plaintiff's title. What that direction ought to be, if the plaintiff at the hearing establish his case, it will be for the learned Judge before whom the cause may be heard, to say.

We do not determine now that the plaintiff will not, if he establish his case, be entitled to other relief than the declaration and relief I have indicated; that will be a question for the hearing. All that we say now is, that the plaintiff being entitled to the declaration and consequential relief indicated, the demurrer should have been overruled.

The appeal is, therefore, allowed, with costs.

BURTON, PATTERSON, and MORRISON, JJ. A., concurred.

Appeal allowed.

SCOTTISH AMERICAN INVESTMENT COMPANY V. THE
CORPORATION OF THE VILLAGE OF ELORA.

*Municipal corporations—Loan to manufacturing company—Power to loan—
Debentures—Rate of interest on.*

Held, affirming the judgment of Proudfoot, V. C., that a municipality, under 36 Vic. ch. 48, sec. 372, sub-sec. 5, O., has power to lend money for the encouragement of a manufacturing establishment, notwithstanding the use of the word "bonus" therein, which does not necessarily import a gift; and they are therefore liable on debentures issued for the purpose of raising money to be so lent.

The rate of interest on the debentures was seven per cent.

Held, that sec. 217 of 29 & 30 Vic. ch. 51, has not been repealed, though marked effete in the schedule prefixed to, and not re-enacted in, 36 Vic. ch. 48, O., and that the above rate was therefore lawful.

Quære, whether the power to give would not include power to lend.

If there had been no power to lend, and the mortgage taken by the municipality to secure repayment of the money lent was invalid. *Quære*, whether this would afford any defence to the debentures; and *Quære*, also, whether the municipality having received the consideration stipulated for, the debenture holders might not have some remedy against the municipality, though not by direct suit on the debentures.

THIS was an appeal from the judgment of Proudfoot, V. C.

The plaintiffs filed their bill to recover the amount of \$700, being one year's interest at the rate of 7 per cent., due the 1st of January, 1880, on debentures issued by the defendants to the amount of \$10,000, the said \$10,000 being a loan to the Elora Manufacturing Company, Limited, a company carrying on business within the limits of the corporation of the Village of Elora.

The defendants resisted payment on the ground that a Municipal Corporation cannot grant aid by way of loan: that they can only grant aid by way of bonus; and that a Municipal Corporation cannot authorize the payment of a greater rate of interest than 6 per cent.

The loan was effected under a By-law, No. 154, entitled a By-law "to provide funds for granting aid by way of loan to the Elora Manufacturing Company, Limited, a manufacturing establishment within the limits of the Village of Elora."

By the by-law the Reeve was authorized to raise by way

of loan the sum of \$10,000, by issuing debentures therefor, for the purpose of granting the sum in aid of the said company, on receiving therefrom security by a first mortgage on its real estate and machinery, for its compliance with the terms and conditions on which such aid might be given.

The cause was heard before Proudfoot, V. C., who made a decree in favour of the plaintiffs.

The learned Vice-Chancellor delivered the following judgment :

PROUDFOOT, V. C.—I think there must be a decree for the plaintiffs in this case. It seems to me the question turns entirely on the construction to be placed on the clause in the statute (a); and I quite agree with the argument of Mr. MacKelcan that he brought so prominently forward. The danger of allowing municipalitites power to lend money was a very proper one for the consideration of the Legislature, but it is not one for me to consider, and the only question I have to do with is, what the Legislature has said in the statute that has been passed on the subject. It is said it authorizes municipalities to make "grants by bonuses" to manufacturing establishments. Well, "bonus," I do not think necessarily means a gratuity; it does not necessarily imply a gift, and the way in which the word is used in the statute, and the thing that it is intended to represent is referred to in the statute, which shews that the Legislature had another meaning than that attached to it; it is not only to be given as a gift or gratuity but it is to be subject to conditions, terms, and restrictions. Now, these are all adverse to the notion of its being a mere gift of money to be handed to the company to do with it as they pleased. The municipality were to take security, and in another part of the statute they are to take some written compliance with the terms and conditions that might be imposed upon it, and the use which should be made of it, and according to this clause of the statute, as I read it, they are to take security in such manner as

(a) 36 Vic. ch. 48, sec. 372, sub-sec. 5, O.

they may deem expedient for the money itself. Now, if the security is to be taken for the money itself, that implies a repayment of the money. There would be no object in taking it except for the purpose of repaying the money, and money given to be paid is a loan no matter what language you use, whether you call it "bonus" or not; but probably the best meaning to be given to the word "bonus," is that used by Mr. Bruce, out of one of the dictionaries—"that it is a boon to the parties who receive." I am sure it would be a great boon to many people to have the chance of getting a loan of money even upon the condition of repaying with seven per cent. interest. It is a boon, though, perhaps, not so great a boon—to so great an extent—as the actual gift of the money; but however that may be as to the original meaning of the word, I think that this clause in the statute expressly points to a condition for a repayment, and, provides that the municipality may take such security as it thinks expedient for the repayment of the money, and being of that opinion, I do not think I ought to give effect to any of those minor objections that were made to the by-law. I do not think there is any rigid iron rule, as Mr. MacKelcan calls it, by which the annual rate must be levied, no matter what the condition of the municipality is. I think if the municipality is in funds to enable them to dispense with the levy of the rate it may do so; and so as to the making provision, I think that equally applies to the other argument about the statute making no provision for the repayment of the money, and none for the employment or use of the money when paid. The statute has not chosen to go into much detail on the subject. There are some general rules applicable to the government of all these municipalities, and among others is the one in which the surplus funds are employed. If they have surplus funds they may reduce the rate of assessment; and in this case if the money were refunded it might be made use of by the municipality, as a means of granting a bonus to another establishment; it might be kept afloat, and indefinitely benefit the township—the municipality; so that I don't think there is any objection to the by-law upon any

of these grounds; and in addition there is the strong irreparable fact that the debentures have got into the hands of *bona fide* holders, for value; and all these objections, if they are to prevail at all, ought only to prevail where it is impossible to avoid giving effect to them; and I don't think I could give effect to them here, and I think the plaintiffs are entitled to a decree for the money. If any interest is to be computed, there must be a reference to the Master here.

From this judgment the defendants appealed.

On September 12th, 1881, the appeal was argued. (a)

Jacobs, for the appellants. No by-law was ever passed in conformity to, and in compliance with, the then existing provisions of the Municipal Act in that behalf, authorizing the loan in question and the issue of the debentures. If such a by-law was passed, it is *ultra vires*, being for the granting of aid by way of loan, and the Municipal Act provides for the granting of aid by way of bonus only. The defendants never issued debentures as alleged in the plaintiff's bill, and there was no evidence on the trial that the debentures produced thereat were issued by them; nor was there any evidence that they passed a by-law authorizing the issue of such debentures and the coupons thereto attached. But admitting that the by-law was proved, and that the debentures produced were issued by the defendants, such by-law and debentures are *ultra vires*, illegal, and void, inasmuch as the by-law provides for the payment of interest on the loan at a rate exceeding the legal rate of interest.

Robinson, Q. C., and *Bruce*, for the respondents. At the examination of witnesses and hearing the appellants' counsel expressly admitted the passing of the by-law, and waived any question as to the proof thereof, and argued the case on the merits; and it is not now open to the appellants to question the sufficiency of the evidence of the existence

(a) *Present*.—SPRAGGE, C. J. O., BURTON, PATTERSON, and MORRISON, JJ. A.

of the by-law and debentures, especially as it was owing to the non-attendance of the reeve and clerk, who were subpœnaed as witnesses by the repondents, that more strict proof was not given of the by-law and its passage. The by-law was and is in conformity to, and in compliance with the provisions of the Municipal Institutions Act in force when it was passed, 36 Vic. ch. 48, sec. 372, sub-sec. 5, O., and is not *ultra vires*. Under such provisions the appellants were authorized to grant aid in the manner they did, and to take security therefor, and were not limited to giving such aid absolutely. It is clear that the granting aid by way of bonus includes granting such aid by way of loan and taking security therefor. The appellants could lawfully agree to pay interest at seven per cent. per annum: *Corporation of North Gwillimbury v. Moore* 15 C. P. 445; *Re Nichol and Corporation of Alnwick*, 41 U. C. R. 577. It is not now open to the appellants to dispute the validity of the by-law or the debentures issued thereunder in the hands of third persons who gave value therefor, and after the payment of three successive annual coupons, and after having taken proceedings to enforce the mortgage from the Manufacturing Company to them: *Webb v. Commissioners of Herne Bay*, L. R. 5 Q. B. 642; *Re Hercules Ins. Co., Brunton's Claim*, L. R. 19 Eq. 302; *Re South Essex Estuary Co., Ex parte Chorley*, L. R. 11 Eq. 157; *Re South Essex Gas, &c., Co., Hulett's Case*, 2 J. & H. 306; *Horton v. Westminster Improvement Commissioners*, 7 Ex. 780. Although debentures of a corporation may not be actionable at law, a Court of Equity may enforce them on such terms as it may deem equitable: *Chambers v. Manchester and Milford R. W. Co.*, 5 B. & S. 588, per Blackburn, J., at p. 610.

November 28th, 1881. SPRAGGE, C. J. O.—The corporation of the village of Elora, having issued debentures in pursuance of a by-law entitled by law “to provide funds for granting aid by way of loan to the Elora Manufacturing Company, Limited, a manufacturing establishment within

the limits of the village of Elora," now repudiates its liability upon the debentures issued; and in the hands of *bona fide* holders for value.

The first objection is, that while it was within the power of the municipality to grant aid to this manufacturing establishment by direct gift, it was *ultra vires* to do so by making a loan.

The passing of this by-law and the issue of the debentures were anterior to the passing of the Revised Statutes. What was done was done under the Municipal Act of 1873, 36 Vic. ch. 48, O.

Sub-section 5 of section 372 gives the authority for granting aid for the promotion of manufactures. Its language is: "For granting aid by way of bonus * * by granting such sum or sums of money to such person or body corporate * * and to pay such sum either in one sum or in an annual or other periodical payments, with or without interest, and subject to such terms, conditions, and restrictions as the said municipality may deem expedient, and may take security therefor. * * Any municipality granting such aid may take and receive of and from such person or body corporate that may receive any such aid, security for the compliance with the terms and conditions upon which such aid may be given."

It is pointed out on behalf of the municipality that in sub-section 4, empowering municipalities to aid agricultural and other societies, and in sub-section 6 to aid road companies, different language is employed. In the former the language is "for granting money or land in aid:" in the latter, "for taking stock in, or lending money, to." And it is argued that if it had been intended to authorize aid to manufacturing companies by lending money, it would have been so expressed in terms, as it is in sub-section 6. The answer to this is, that it does not seem to have been intended to authorize aid to road companies by way of gift, but only by taking stock or making a loan. The language used in sub-section 4 is sufficiently comprehensive, but the same language was probably not used in

sub-section 5 because less appropriate to the subject matter than the language used. But hyper-criticism is not the best test of the meaning of a statute. Our Acts of Parliament are not always so symmetrical, or their language so appropriate, as they might be. There are, at any rate, reasons for the difference in the language of each of these three sub-sections; and the question comes to this: whether sub-section 5, reading the whole of it, yet reading it by itself, authorizes the lending of money for the promotion of manufactures.

I incline to think that the word *bonus*, taken by itself, imports a gift, at least in its primary sense; but it may not be necessarily confined to that meaning, and the contest may shew that it is not. Coming to the words in this section "and may take security therefor," I should, if the sub-section had ended there, have read the words, as applying to security to be taken by the municipality for the observance by the manufacturers, of the terms, restrictions, and conditions imposed by the municipality upon granting their aid; but reading on, we find express provision for that purpose, in terms that I have already quoted. The Legislature has, therefore, either repeated its provision as to security, and for what it may be required to be given; or the thing to which it refers in one place as the object for which security may be required, is not the same thing, or security for the same object, as is referred to in the other. If, then, the security first spoken of in the section is not security for the object lastly spoken of, there appears to be no other subject to which it is applicable than security for repayment of the money granted in aid, unless the term used, "*bonus*," excludes that interpretation, which I think it does not; and I confess I can see no reason likely to influence the Legislature, if it deemed it expedient to empower municipalities to make a gift of money in furtherance of certain objects, why it should have debarred them from granting the aid by way of loan.

I have examined the American case of *Kenicott v. The*

Supervisors, 16 Wallace 452. I do not know that it throws much light upon this case, though the meaning of the word "bonus" was discussed in it. A vote of electors was taken upon a question proposed to them in this shape: "For appropriating the swamp lands of Wayne county as a bonus to any company for building a railroad through said county." It was obvious from the terms of the question that the word bonus was not used as a synonym for gift; but that the proposed appropriation of lands to a company was a valuable consideration for what was proposed as an equivalent to the county by having a road built through it. The Court thought that the word did not necessarily import a gift or gratuity; but that if it were assumed that it did, the meaning was controlled and limited by the connection in which it was there used. It is to that extent in consonance with our opinion of the use of the word in our statute.

Assuming, however, that the word "bonus" is to be construed, notwithstanding its context, to mean a gift, it may be a question whether a maxim which Mr. *Broom*, in his *Legal Maxims*, 4th ed., 176, styles a doctrine founded on common sense and of very general importance and application, does not apply "*non debet cui plus licet quod minus est non licere*,"—he who has authority to do the more important act shall not be debarred from doing that of less importance." Mr. *Broom* refers to examples, one of them, that if there be a custom within any manor that copyhold lands may be granted in fee simple, by the same custom they are grantable to one and the heirs of his body for life, for years, or in tail; and this we find to have been decided in *Brown's Case*, 4 Rep. 23, the same maxim being cited for it. I have not examined whether the power being exercisable by a corporate body would prevent the application of this maxim. I see no reason why it should.

There is another maxim which may be not inapplicable to the position of these parties, viz., *Broom's Legal Maxims*, 4th ed., 177: That "where more is done than ought

to be done, that portion for which there was authority, shall stand, and the act shall be void *quoad* the excess only—*quando plus fit quam fieri debet, videtur etiam illud fieri quod faciendum est.*"

I assume for the present that the municipality had power to make a gift of money to the manufacturing company, and to issue debentures to raise money for the purpose, but had not power in terms to *lend money* to the company; that it was lawful that the company should be aided by money granted by the municipality to the company; but it was not lawful that the municipality should take security for its repayment. May not the payment of the money stand, and the taking of the security only be impeachable? It may be that the company could make this objection to the payment of the money, though certainly it would be as dishonest as is the defence made by this municipality to the payment of their debentures. It is, at any rate, an honest argument in the mouth of the holders of the debentures.

This case may admit, also, of other considerations. One is whether the municipality having received the benefit stipulated for, in the manufacturing establishment having been opened and carried on, there has not been an executed consideration entitling the plaintiffs to some remedy against the municipality, though not by direct suit upon the debentures. Upon this point *Anglo-Australian Life Assurance Co. v. British Provident Life, &c., Society*, 3 Giff. 521; *Re Sea Fire and Life Assurance Co., Official Manager of London Ship Owners' Loan and Assurance Co.'s Case*, 5 D. M. & G. 465; *Re Phoenix Life Assurance Co., Burges and Stock's Case*, 2 J. & H. 441; *Re Durham County Permanent, &c., Society—Davis's Case, Wilson's Case*—L. R. 12 Eq. 516, 521, may be referred to.

I have touched but briefly upon these points, other than the first—the construction of the statute; and express no opinion upon them, because I consider the first point sufficient for the determination of this branch of the case.

The corporation of Elora allege as a further objection

to their debentures, that whether they had or had not power to lend money to manufacturing companies, they had not power to borrow money upon their debentures for that purpose. But the Municipal Act of 1871, 34 Vic. ch. 30, sec. 6, confers that power upon municipalities in express terms; and this section is not repealed by the Municipal Act of 1873, but only such Acts and parts of Acts relating to municipal institutions are repealed, as might be inconsistent with the provisions of the later Act. It is not pointed out that the issue of debentures is inconsistent with any provision in the Act of 1873; and that Act assumes their lawfulness and makes provisions, sec. 296 and following sections, in regard to their execution and transfer. See particularly sec. 297.

The corporation of Elora has still another objection to its debentures. They are made to bear interest at 7 per cent., when, as the defendants say, they could not lawfully bear interest at a higher rate than 6 per cent. In the last Municipal Act for Upper Canada passed by the Legislature of the old Province of Canada, 29-30 Vic. ch. 51, the issue of debentures bearing a higher rate of interest than 6 per cent. is expressly authorized. In *Re Nichol and Corporation of Alnwick*, 41 U. C. R. 577, Wilson, J., now C. J., cites the section 217 in full, and says if that section "had remained in force there could have been no doubt upon the question;" and in that I entirely agree. "But," the learned Judge says, "it was not continued in the Act of 1873. In the schedule of that Act the above section, 217, is marked *effete*."

The section is certainly not re-enacted by the Act of 1873; but it does not follow that it thereby ceased to be the law, inasmuch as it is not inconsistent with any provision in the later Act; and its non-re-enactment may be attributable to a cause suggested by my brother Burton during the argument, viz.: that it was a provision by the Dominion Parliament respecting interest, a subject in relation to which that Parliament and not the Provincial Legislature had and has jurisdiction. Its being marked

effete in the schedule prefixed to the Act of 1873 is not legislation; and it is not very material to inquire why it is so marked. I observe the words "criminal law" marked in the schedule opposite some sections of the Act of 1866, indicating the assumed reason, as I suppose, why they find no place in the Act of 1873, the same reason as is suggested by my learned brother for section 217 finding no place there. To re-enact the sections, making certain Acts criminal, would have been assuming to legislate where the power to legislate resided elsewhere. It will not be contended that those sections of the Act of 1866 are abrogated by the simple omission to re-enact them, when there was no authority to re-enact them; and the same reasoning applies to the non-re-enactment of section 217.

If I may hazard a conjecture, I should say it is probable that the compiler of the schedule, aware of the decision of the case of *Corporation of North Guwillimbury v. Moore*, 15 C. P. 445, nine years before, considered that it settled the law, placing municipalities upon the same footing as individuals as to interest payable or receivable by them. If he had placed "interest" or "rate of interest" where he has put the word *effete*, or in addition to that word, it would, I think, have been better.

In my opinion, section 217 of the old Act of 1866 stands unrepealed. It is unnecessary, therefore, to consider whether, independently of that section, debentures might be issued bearing a higher rate of interest than 6 per cent.

The result is, that the village of Elora fails in its attempted repudiation of its engagements.

The appeal is disallowed, with costs.

BURTON, PATTERSON, and MORRISON, J J. A., concurred.

PEEK ET AL. V. SHIELDS ET AL.

Insolvent Act, 1864, sec. 8, sub-sec. 7—Insolvent Act, 1875, sec. 136—Fraud in obtaining credit—Contract made abroad—Jurisdiction of Dominion parliament.

The plaintiffs sued for goods sold and delivered to defendants who were insolvents, and under sec. 136 of the Insolvent Act of 1875, charged the defendants with fraud in procuring the goods on credit, knowing themselves to be unable to meet their engagements, and concealing the fact from the plaintiffs, thereby becoming their creditors with intent to defraud them. The defendants were domiciled in Ontario, and the contract was made in England.

Held, affirming the judgment of the Court of Common Pleas, reported in 31 C. P. 112, that the act charged was not a crime, nor the charge of fraud a criminal proceeding, but merely a proceeding at the instance of a private person to enforce payment of a debt; and it made no difference therefore that the contract out of which the cause of action arose, was made in England.

Per SPRAGGE, C. J. O., and MORRISON, J. A.—Sec. 136, dealing with matter of procedure incident to the law of bankruptcy and insolvency, was within the jurisdiction of the parliament of Canada to enact.

Per BURTON, J. A.—Sec. 136, which gives certain creditors an additional remedy in the Provincial Courts for the recovery of their debts in full, is *ultra vires* of the Parliament of Canada; but sec. 8, sub-sec. 7 of the Insolvent Act of 1864, to the same effect, is still in force, the Parliament of Canada having no power to repeal it.

Per PATTERSON, J. A.—It is immaterial whether sec. 136 is *ultra vires* or not; for if the Parliament of Canada had the power to deal with the subject of that section, it would be binding, but if not, then the same enactment in sec. 8, sub-sec. 7, of the Act of 1864, is unrepealed and in force.

THIS was an appeal from the judgment of the Court of Common Pleas in favour of the plaintiffs on the demurrer to the third plea, reported in 31 C. P. 112, where the pleadings are fully set out.

The appellants' reasons of appeal were, that the judgment of the Court of Common Pleas is erroneous, and ought to be reversed, for the following amongst other reasons:

1. The alleged fraudulent act having been committed in another country, is not cognizable in the Courts of this Province if it is a crime, or even if it is a mere penal proceeding, inasmuch as the statute does not profess to include crimes committed outside of the Dominion of Canada.

2. If the alleged fraudulent act is not a crime, then sections 136 and 137 of the Act are *ultra vires* of the Parliament of the Dominion, in that they assume to provide for

civil procedure in Provincial Courts, which is a matter within the exclusive jurisdiction of the Provincial Legislature.

The respondents' reasons against the appeal were, that the judgment of the Court of Common Pleas is not erroneous, and ought not to be reversed, for the following amongst other reasons :

1. Even if the fraudulent act complained of be a crime, it is cognizable in the Courts of this Province, even though it was committed in another country, the said Courts having had conferred upon them Common Law Jurisdiction by the Imperial Parliament in 1792. The Imperial Parliament has power to enact that any offence against its laws, whether committed within or without its dominion, is a crime, and punishable according to its laws, whenever the offender is tried within its territorial limits (*Maxwell on Statutes*, pp. 119-122, 126-7), and the Imperial Parliament conferred upon the Dominion Parliament equal powers as to governing those resident in the Dominion. The Insolvent Act deals with "*all creditors*," barring their claims, and extending to them all the benefits of the Act, and thus does profess to include within its provisions offences by the insolvent against his creditors, whether such creditors be resident within or without the Dominion ; if the redress be sought in the Courts of the Dominion against the insolvent, then within the jurisdiction of such Court.

2. If the fraudulent act is not a crime, there seems to be no doubt it is *intra vires* of the Dominion of Canada to provide for civil procedure. In dealing with Dominion laws the Dominion Parliament does not recognize provincial limits ; it enacts for the Dominion as a whole without territorial distinction, else the anomaly would exist of its being compelled to ask the several Local Legislatures to assist it in the administration of its own laws. See *Niagara Election Case*, 29 C. P. 261, and *Valin v. Langlois*, L. R. 5. App. 115.

On September 14th, 1881, the appeal was argued (a).

(a). *Present*.—SPRAGGE, C. J. O., BURTON, PATTERSON, and MORRISON, JJ. A.

Bethune, Q. C., for the appellants.

J. E. Rose, Q. C., for the respondents.

The arguments were substantially the same as in the Court below.

November 28, 1881. SPRAGGE, C. J. O.—The plaintiffs sued in the Court of Common Pleas, under section 136, of the Insolvent Act of 1875, to recover the value of two parcels of goods sold by the plaintiffs to the defendants. The allegations in the second count of the declaration are sufficient to bring the case within the section which I have quoted. The third plea alleges that the contract out of which the alleged cause of action arose was made in the United Kingdom, and not within the Dominion of Canada. To this plea the plaintiff demurred; and upon the argument of the demurrer it was agreed that the pleadings should be amended by alleging that the defendants were traders and British subjects, resident and domiciled in the Dominion of Canada, at the time of the purchase of the goods in question, and subsequently became insolvent under the Insolvent Act of 1875, and amendments thereto. Judgment was given for the plaintiffs upon the demurrer by the majority of the Court, the learned Chief Justice dissenting. The defendants have since been allowed to plead that they have obtained their discharge.

The first question for the decision of the Court was, whether the statute makes the obtaining of goods by a trader afterwards becoming insolvent, under the circumstances stated in the declaration, a crime or offence, and the proceedings authorized by the statute criminal proceedings for its punishment. The second question was, as put by Mr. Justice Osler in his judgment, whether this proceeding is a matter of civil procedure, or connected with civil rights, and therefore *ultra vires* of the Dominion Legislature, or assuming that that Legislature had power to provide machinery for the administration of the Insolvent Act, as a means of distributing the estate of an insolvent,

and giving or refusing him his discharge, they could give a creditor any additional remedy for the recovery of his debt.

The first question has been dealt with very elaborately in the judgment of Mr. Justice Osler, in which he has reviewed the cases bearing upon the point. I so entirely agree in the conclusion at which he has arrived, and in the reasoning by which he has reached that conclusion, that I feel that I cannot usefully add anything to the judgment which he has delivered.

The second question requires consideration. The British America Act assigns to the Provincial Legislature exclusive powers of legislation in a number of classes of subjects; among them "Property and Civil Rights in the Province," and "the Administration of Justice in the Province, including the constitution, maintenance, and organization of Provincial Courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those Courts." Section 136 of the Insolvent Act does unquestionably touch and affect "Property and Civil Rights," and also procedure in a civil matter in the Courts of the Provinces; but among the powers of the Parliament of the Dominion we find legislation upon "Bankruptcy and Insolvency."

The observations of Sir Montague Smith, by whom the judgment of their Lordships was delivered in the Privy Council in the case of *Cushing v. Dupuy*, L. R. 5 App. 409, 415, are apposite to this point: "It was contended for the appellant that the provisions of the *Insolvency Act* interfered with property and civil rights, and was therefore *ultra vires*. This objection was very faintly urged, but it was strongly contended that the Parliament of Canada could not take away the right of appeal to the Queen from final judgments of the Court of Queen's Bench, which, it was said, was part of the procedure in civil matters exclusively assigned to the Legislature of the Province. The answer to these objections is obvious. It would be impossible to advance a step in the construction of a

scheme for the administration of insolvent estates without interfering with and modifying some of the ordinary rights of property, and other civil rights, nor without providing some mode of special procedure for the vesting, realization, and distribution of the estate, and the settlement of the liabilities of the insolvent. Procedure must necessarily form an essential part of any law dealing with insolvency. It is therefore to be presumed, indeed it is a necessary implication, that the Imperial Statute, in assigning to the Dominion Parliament the subjects of bankruptcy and insolvency, intended to confer on it legislative power to interfere with property, civil rights, and procedure within the Provinces, so far as a general law relating to those subjects might affect them."

In *Valin v. Langois*, also in the Privy Council, reported in the same volume, L. R. 5 App. 115, where also the power of Legislation by the Dominion Parliament was brought in question, Lord Selborne said, at p. 118: "It is not to be presumed that the Legislature of the Dominion has exceeded its powers, unless upon grounds really of a serious character." I may be permitted to add my own view of the powers of the Dominion and Provincial Legislatures respectively in a case in the Court of Chancery not yet reported: *Smith v. Merchants Bank (a)*. "Legislation upon property and civil rights in the abstract is committed to the Provincial Legislatures; but where they are affected only by the legislation of the Dominion Parliament upon subjects upon which the Parliament has express authority to legislate it cannot be an invasion of the functions of the Provincial Legislature for the Parliament so to legislate. To hold otherwise would be to nullify the powers of Parliament, not only in its legislation upon the two subjects to which I have expressly referred, but upon many other subjects which are made expressly subjects of its jurisdiction; not certainly less than one-half of the twenty-nine

(a) Since reported, 28 Gr. 629. The case has been taken to the Court of Appeal and argued, but is not yet decided.

subjects in which exclusive legislative authority is given to the Dominion Parliament."

In the *Niagara Election Case*, 29 C. P. 261, Chief Justice Wilson and Mr. Justice Gwynne, then in the Common Pleas, have very lucidly (if I may be permitted to say so) explained the relative powers of the Dominion and Provincial Legislatures. *Valin v. Langlois*, L. R. 5 App. 115, to which I have already referred, is in affirmance of this judgment of our Court of Common Pleas.

We must approach the consideration of this branch of the case before us, having regard to the principles enunciated in the two cases I have referred to in the Privy Council; but still if in our judgment the Dominion Parliament has in this matter exceeded the authority conferred upon it by the British America Act, it is our duty to say so, and to adjudge accordingly.

The power of legislation conferred upon the Dominion Legislature is comprehensive. After the general power conferred by section 91, it proceeds to give exclusive legislative authority, and says that it extends to all matters coming within the classes of subjects enumerated. So applying it to the subject matter in question, the authority conferred extends to all matters coming within the terms "Bankruptcy and Insolvency," or, as put in the earlier part of the section, in relation to all matters not coming within the classes of subjects assigned to the Provincial Legislatures, and therefore in relation to bankruptcy and insolvency.

It cannot, I conceive, be contended that any enactment by the Dominion Legislature making the same provision in respect to an insolvent and his dealings with creditors before assignment or attachment, as was at the date of the passing of the British America Act by an Act of the Imperial Parliament in force in England in respect to bankruptcy before adjudication, would be *ultra vires*. I take this to be too clear for argument. The Act in force in England at that date was the Bankruptcy Act of 1861.

Our Insolvency Acts of 1864, 1869, and 1875, were taken

in a large measure from that Act, and it may be from subsequent Acts, but for the purpose of the position I am taking I confine myself to that Act. By the 10th clause of section 221, acts by a trader of a similar character to those defined by section 136 of our Act are dealt with. Section 221 makes it a misdemeanor punishable with imprisonment for the trader to do certain acts, one of these being by section 10 defined thus: "If being a trader he shall, within three months next before the filing of the petition for adjudication, under the false color and pretence of carrying on business and dealing in the ordinary course of trade, have obtained on credit from any person, any goods or chattels with intent to defraud." It was competent to the Dominion Legislature in legislating upon bankruptcy or insolvency to make an enactment in the same or the like terms; or as it has done, in the terms of sec. 136; and if it thought fit, to annex the same penal consequences to the commission of the act; but surely while dealing with the act it was not bound to annex to it the same penal consequences.

It was an enactment falling properly within the purview of a Bankruptcy or Insolvency Act, and provided for a case proper to be made an exception to the other cases of the contracting of debts by the insolvent. Can we say, in the face of the comprehensive terms in which power to legislate upon this subject is given to the Dominion Legislature, that it had not power to annex to the commission of this fraudulent Act such penal consequences, or consequences not penal, as it might think fit? It was put in argument that the penalty prescribed by our act is not a necessary incident to the winding up of the estate; that the money recovered does not go into the general estate; but the same may be said of the penal consequences attached to the like fraudulent Act in England. And it may be asked who is made the judge of these things? Is it a Provincial Court or the Dominion Parliament?

Then can it be said that sec. 136 cannot be carried out without an unwarrantable interference with that which is

of the exclusive function of the Provincial Legislature in my opinion it can. What are the real nature and effect of this provision? It deals with an insolvent who has been brought within the jurisdiction of a Court, the creation of the Dominion Parliament, and within the provisions of a law which places him as one of a class upon a different footing, as regards his property and his person, from others of the Queen's subjects. The Legislature had authority to say that as to debts fraudulently contracted, they should be dealt with in an exceptional manner: that as to them there should be no composition, but that they should be payable in full; and that as a punishment for the fraud he should be imprisoned for two years. The Legislature has not said quite all this, but still dealing with it as an exceptional case, because a case of fraud, it has provided more stringent means for its recovery than in the case of ordinary debts of the insolvent; and after all has dealt with it only as the Legislature of Ontario has dealt with fraudulent debtors outside of the Insolvent Act.

How then does this section interfere with that which is the exclusive function of the Province, its legislation in relation to property and civil rights? That has been disposed of beyond a question in the judgment that I have quoted, of Sir Montague Smith. As to the Administration of Justice in the Province, it admits of a like answer, and this further, that only in so far as proceedings in insolvency are a part of the Administration of Justice does it interfere at all, and as to that its power to interfere is given by the same authority as are the powers of Provincial Legislatures; and as to the constitution, maintenance, and organization of Provincial Courts, it does not interfere at all. Then does it interfere with Provincial Legislation as to procedure in civil matters in those Courts? This admits of two answers, one that it only applies to and does not interfere with, the procedure in civil matters—not interfering at all with Provincial Legislation upon that subject. The other answer is, that Insolvent Courts are not Provincial, but

Dominion Courts, constituted for the sole purpose of administering a law of the Dominion, and with power incident to their functions, to frame a procedure of their own or to adopt the procedure of Provincial Courts in civil matters. And I may here notice that Sir Montague Smith, in the passage that I have quoted from his judgment, refers repeatedly to interference with procedure as a power intended to be conferred upon the Dominion Legislature in matters of bankruptcy and insolvency, as well as power to interfere with property and civil rights.

It appears to me to be very clear from the language that I have quoted from the British America Act, that the Imperial Parliament intended to confer upon the Dominion Legislature full powers to legislate (*inter alia*) upon all matters in relation to bankruptcy and insolvency, whether such legislation should have the effect of interfering with property and civil rights, or the Administration of Justice, outside of the law relating to bankrupts and insolvents, or with procedure in civil matters, or not. To interpret the Act otherwise would cripple the Dominion Legislature in the exercise of its powers, where full powers are intended to be conveyed. In my judgment the proper construction of the British America Act necessarily leads to the conclusion that the power to pass such an enactment as section 136 was conferred upon the Dominion Parliament, and the provision of the bankruptcy laws in England, at that date, confirms me in that opinion. I should come to that conclusion independently of the cases in the Privy Council to which I have referred. Those cases give the sanction of the highest authority to the position that in my judgment is the correct one. I cannot assume that the Dominion Parliament would under cover of a Bankrupt or Insolvent Act make any enactment not fairly falling within the scope of those subjects. If it should do so, it would be a colourable Act; and if an invasion of the powers conferred upon the Provincial Legislature, the Courts of the Province would, I have no doubt, know how to deal with it.

BURTON, J. A.—It was admitted on both sides, on the argument, that the broad question intended to be raised on this appeal was whether the 136th section of the Insolvent Act applied in the case of a debtor resident and domiciled in Ontario contracting a debt in England under the circumstances referred to in that section as subjecting the debtor to imprisonment if found guilty of the fraud alleged, if it had been committed here—the debtor having subsequently become insolvent under the Act of 1875—and that any amendment necessary to raise that question should be made or considered as made.

Whilst differing with the Court below in the reasons given for their decision, I have arrived at the same result.

I differ from them in the view they take of the power of the Dominion Parliament to enact the section in question, which, for convenience, I will again repeat in substance.

Any person who purchases goods on credit, knowing or believing himself to be unable to meet his engagements, and concealing the fact from the person thereby becoming his creditor with the intent to defraud such person, and who shall not afterwards have paid the debt so incurred, shall be held to be guilty of a fraud, and shall be liable to imprisonment for such time as the Court may order, not exceeding two years, unless the debt and costs be sooner paid.

I think, for the reasons I shall presently give, this was clearly beyond the power of that Legislature to enact.

Apart from the observations of Sir Montague Smith, in delivering the judgment of the Privy Council in *Cushing v. Dupuy*, to which we were referred, I should have supposed it to be a self-evident proposition that, when the Imperial Parliament conferred upon the Legislature of the Dominion the exclusive power of dealing with bankruptcy and insolvency, it followed, as a necessary implication, that, so far as it was necessary for the working of any measure passed with that object, and for providing a procedure for the vesting, realization, and distribution of an insolvent's estate, that Legislature must have the power to interfere

with property and civil rights and procedure within the respective Provinces.

It does not appear to me to be safe to say that the Dominion Parliament would, under the powers given to them to deal with bankruptcy and insolvency, necessarily have authority to enact similar provisions to those to be found in the Bankrupt Act in England at the time of the passing of the British North America Act. The Imperial Parliament having power to deal generally with all subjects, and having power to deal with the criminal law, no question could possibly arise there, although the enactment might deal with matters not coming strictly within the scope of a law relating to bankruptcy; but assume for the moment that the criminal law had been placed under the exclusive jurisdiction of the Provincial Legislature, I should suppose it to be too clear for argument that the Dominion Parliament would have been confined to the enactment of such provisions as would secure the realization and equal distribution of the insolvent's estate, with power, no doubt, to punish fraudulent conduct on the part of the insolvent by the withholding of his discharge, but that it would be clearly in excess of their powers to declare any violation of its provisions or any fraudulent or dishonest conduct of the insolvent a felony or misdemeanor punishable by imprisonment in the Provincial Penitentiary.

The Provincial Legislature would, in the case I have supposed, have the exclusive power to say whether certain acts, declared by the Insolvent Act of the Dominion, to be fraudulent and such as would be sufficient to prevent the insolvent from obtaining his discharge, should also be made criminal offences subjecting him to the risk of being indicted and tried for them as a criminal.

The Dominion Parliament has power, however, to deal with the criminal as well as the insolvent laws, and therefore one is not surprised to find that they have in many respects followed the Imperial legislation on a similar subject, and declared many things to be misdemeanors which are also misdemeanors in the English Act.

I may say, however, that no such enactment as section 136 is to be found in the Imperial Act; it is as regards bankruptcy proceedings, *sui generis*, and I may add seems opposed to and inconsistent with the generally entertained idea of a Bankruptcy Act, the general scope and object of which is to secure an equal distribution of the debtor's effects among the creditors.

I have nothing to say against the policy of a law which punishes with imprisonment for a certain time, or until compensation is made to the creditor, a debtor who having reason to believe that he is unable to meet his engagements, and concealing the fact from his creditor, obtains credit with intent to defraud; but there is no special reason why that should apply to an insolvent in the legal sense of the term more than to any other person who thus fraudulently contracts a debt and then refuses to pay, and it seems to me, therefore, to be a matter not only not within the general scope of an Act for the administration of an insolvent's estate, but opposed to the spirit of such an enactment. It is in point of fact providing an additional remedy to the creditor so defrauded for the recovery of his debt, and so comes exclusively within the power of the Provincial Legislature.

The Legislature of Canada did, it is true, before confederation, by the Act of 1864, pass a similar clause, but it was then clothed with plenary powers, not restricted as the Dominion Parliament now is to legislate upon certain subjects, and no analogy therefore is to be drawn, any more than from the Imperial Legislation, from their having exercised such a power. Whether it was a matter of bankruptcy law or a matter of procedure in the Courts of law, that Legislature had equally power to deal with it.

And that seems to me to be the crucial test in this case. If it was a mere matter of procedure in the practice of the Courts of common law, the Dominion Parliament, dealing with the question as an original piece of legislation, would have no power to enact it, and as a consequence no power to repeal the section which the Parliament of the

Province of Canada had thought fit to enact. If, on the contrary, it is a subject which comes properly within a scheme for the realization and distribution of an insolvent estate, then the Dominion Parliament had power to repeal the section in the former Act, and to enact it either in its original shape, or with such modifications or amendments as they might think proper.

I agree with the observations of Mr. Justice Osler as to the desirability of embracing in any bankruptcy law, not only a scheme for dividing the debtor's estate, but for punishing dishonesty, and think it was a wise provision to vest in the same Legislature the power to enact a bankruptcy law, and to deal exclusively with the criminal law. They thus possess the power to declare certain acts to be misdemeanours in addition to the punishing the debtor by withholding his discharge, a power which they unquestionably have under the general power of dealing with bankruptcy.

The Legislature of the Dominion has, in the Act in question, declared certain acts to be misdemeanours, and they have drawn a distinction between those cases and that we are now considering. In cases of this description, they have not made it a misdemeanour, but have contented themselves with declaring that if the creditor sues in the common law Courts of the Province for such a claim, and succeeds in establishing fraud, the creditor shall have an additional remedy for the recovery of his debt; that is to say, imprisonment for such a limited term as the Judge directs, unless the debt and costs be sooner paid.

I do not at all question the dictum attributed to the Chief Justice of the Supreme Court, in *Valin v. Langlois*, on the contrary, it has my hearty concurrence—that nothing contained in sections 14 and 92 of the British North America Act interferes with or restricts the right or power of the Dominion Parliament to direct the mode of procedure to be adopted in those cases in which that Parliament has jurisdiction, and where it is exclusively authorized to deal with the subject matter.

The Insolvent Act has provided a machinery for carrying out its provisions, and has made this the final Court of Appeal by parties aggrieved from the decisions of the Judges of first instance.

The Provincial Legislature, under the powers conferred upon them under sections 14 and 92, wide as they appear to be, could not of course make any alteration in the constitution of these Courts, or in the procedure prescribed in the Insolvent Act; but the Dominion Legislature are equally precluded from interfering with the procedure in the Courts which are not under their jurisdiction.

The plaintiff here is not proving upon the estate or taking any proceedings in the Insolvent Court, but is suing in one of the Provincial Courts. According to the procedure of that Court, he is entitled after recovery of judgment to imprison the debtor in certain cases, but as at present advised, the local Legislature has exclusive power to say upon what terms and in what cases he shall exercise the right to imprison the debtor.

I do not see upon what pretence this can be said to come within the general scope and scheme of a Bankruptcy Act. To my mind, it is entirely inconsistent with and opposed to the principles of that kind of legislation, the aim and object of such a law being to secure the assets of the debtor for the general body of creditors.

On a prosecution for any of the matters declared to be criminal offences under the Act, it would be competent for the Judge to suspend sentence with a view to the restoration by the criminal of the property withdrawn from the estate, but the provision in question has no such object in view, but attempts to secure to the particular creditor defrauded an additional remedy, and is foreign to the scheme of an insolvent law, and an usurpation by the Dominion Legislature of a power to deal with a subject exclusively within the jurisdiction of the local authorities.

But the same reasons which preclude the Dominion Parliament from enacting such a clause apply with equal force when we consider their right to repeal the section in

the Act of the old Parliament of Canada. I think that section is still in force, and possibly applies to any person whether an insolvent or not. The proceedings are not alleged to be under that Act, but I understood the parties to desire our opinion upon the question generally, and to consent to any amendment which might be necessary.

We have in this view to consider Chief Justice Wilson's objection, that although not a crime, still if a penal proceeding, the remedy could not be invoked in favour of this creditor, because the fraud, if any, was committed outside the limits of the Province.

If this be so, it is rather an alarming state of things, but whilst fully conceding the rule enunciated by him that one country cannot legislate so as to make that legislation binding on another country, I fail to see its application in the present case.

It does not, so far as the matter we are discussing is concerned, become material to consider where the debt was contracted. The alleged fraud does not affect the contract in the sense of making it invalid. When it was entered into it was uncertain where it would be enforced—but all parties knew that wherever it was enforced the laws of that country would regulate the remedy. The creditor has to follow the debtor, and must sue him generally where he resides, and although the *lex loci contractus* may be referred to for the purpose of expounding the contract, the rules of evidence, of prescription, and of practice will be those of the country where the remedy is being sought. Having to submit to these, which it may be are more disadvantageous than those of his own country, he is also entitled to such benefits as that law gives him, or as the matter is better stated by Lord Tenderden, in *De La Vega v. Vianna*, 1 B. & Ad. 284, at p. 288: "A person suing in this country must take the law as he finds it; he cannot, by virtue of any regulation of his own country, enjoy greater advantages than other suitors here, and he ought not therefore to be deprived of any superior advantage which the law of this country may confer. He is to have the same rights which all the subjects of this kingdom are entitled to."

In the Act for the relief of insolvent debtors passed by the late Parliament of Canada, and which provided for the discharge upon certain terms of persons confined for debt, is to be found a provision of this nature.

"In case it appears to the Court that the debt for which the debtor is confined, was contracted by any manner of fraud or breach of trust, or under false pretences, or that he wilfully contracted the debt without having had at the same time a reasonable assurance of being able to pay the same, or that he is confined by reason of any judgment in an action for breach of promise of marriage, seduction, &c., the Court may order the applicant to be recommitted to close custody for any period not exceeding twelve months."

Here no option appears to be reserved to the debtor to get rid of the imprisonment by payment of the debt, and yet it has never been suggested that if the seduction occurred in a foreign country, or the fraud was there committed, that the Court could not make the order for committal.

I think it is a mere matter of procedure; the defendant is a Canadian subject, not a stranger coming into the country and accidentally sued here, although I think that circumstance would make no difference—the plaintiff is here the stranger seeking his remedy in our Courts, and is entitled to the same remedies as the inhabitants of this Province.

I think, therefore, the appeal should be dismissed, with costs.

PATTERSON, J. A.—The plaintiffs sue upon the money counts, and charge that the defendants have been guilty of fraud, within the meaning of the Insolvent Act of 1875, by purchasing from the plaintiffs, on credit, the goods for the price of which the action is brought, knowing or having probable cause for believing themselves to be unable to meet their engagements, and concealing that fact from the plaintiffs with the intent to defraud the plaintiffs; and they aver that the term of credit has elapsed, and

that defendants have not paid or caused to be paid the debt so incurred.

The third plea of the defendant Shields alleges that the contract, out of which the cause of action arose, was made in England and not within the Dominion of Canada.

It is agreed that these pleadings are to be treated as amended by alleging that the defendants were traders and British subjects, resident and domiciled in the Dominion of Canada, at the time of the purchase of the goods, and subsequently became insolvents under the Insolvent Act of 1875.

The memorandum of this agreement does not specify which of the added allegations are supposed to belong to the declaration and which to the plea. We may treat them all as belonging to the declaration. They are intended to complete the facts necessary, under sec. 136, to establish against the defendants the charge of fraud, and the liability to "imprisonment for such time as the Court may order, not exceeding two years, unless the debt and costs be sooner paid."

The plea is evidently bad as in no way answering the action for the debt, but almost in terms confessing it. It is addressed not to the debt, but to the charge of fraud, which it also admits, raising only the question whether such a fraud, committed in England, can be punished under section 136, notwithstanding that it was committed by a trader resident and domiciled in Canada, subject to the laws of the Dominion, having, after the commission of the fraud, been adjudged an insolvent under our statute, and who, when he committed the fraud, knew or had probable cause for believing himself unable to meet his engagements.

The plea has apparently been treated as pleaded only to the latter part of the declaration, and it ought properly to have been so amended as to confine it to that part.

There are no formal exceptions to the declaration; but, upon the demurrer to the plea the whole question has been dealt with, including the power of the Parliament of Canada to pass section 136 of the Act, and the con-

struction of that section as applying only to frauds committed within the Dominion, or to frauds wherever committed. The questions have in fact been argued as upon a case stated, without the more regular method of stating a case being adopted. Upon the first of these questions, I agree with the opinion arrived at by the majority of the Court below, from which I do not understand the Chief Justice, who dissented upon the second question, to differ, that the law formulated in section 136 is the law of this Province, although I may reach that conclusion by a somewhat different route.

The British North America Act gave to the Parliament of Canada legislative jurisdiction over the subject of bankruptcy and insolvency, and also over the subject of criminal law.

It would, beyond question, have been within that jurisdiction to punish as a crime the fraud described in section 136; and if an enactment of that effect had been embodied in the Insolvent Act, it would have, in that particular, resembled several clauses in the Imperial Bankruptcy Act, 1861, 24 & 25 Vic. ch. 134, as *e. g.*, sec. 205, which made forgery of certain documents, &c., felony, and section 221, which made any one of a long list of acts a misdemeanour, if done by a bankrupt.

But I entirely agree with Mr. Justice Osler, in the reasoning by which he shews that section 136 is not to be regarded as an addition to our criminal law, but as a matter of procedure, or a mode of enforcing payment of the debt. At the same time I desire not to be understood to intimate any doubt of the propriety of regarding it, as the Chief Justice did for the purpose of his judgment in the Court below, as a penal proceeding to be enforced by or in a civil action.

I think we are scarcely at liberty to make the ordinary limits or the leading objects of bankruptcy law, the test of the binding effect of the law of section 136.

We must remember that we had, in the Province of Canada, the Insolvent Act of 1864, which was in force

when the Confederation of the Provinces took place, and that subsections 7 and 8 of section 8 of that Act were essentially the same as sections 136 and 137 of the Act of 1875.

Those very provisions therefore existed, at least in the present Provinces of Ontario and Quebec, as part of the insolvent law, when the subject was assigned to the jurisdiction of the Parliament of Canada. This would, as it strikes me, afford a strong, if not an unanswerable reason for holding, in this Province at all events, that the re-enactment of the law as it stood, or of such parts of it as the Parliament thought proper to re-enact, was *intra vires*. But it hardly becomes necessary to decide that question; because, if the subject of section 136 were outside of the subject of insolvency, it would seem to follow that the Parliament had no power to repeal that portion of the Act of 1864, and that consequently subsections 7 and 8 of section 8 are still in force. Thus the rule of law formulated by section 136, whether it derives its force from the Act of 1875, or from that of 1864, must be the law of this Province.

Then as to the question raised by the plea. I have been impressed by the force of the reasons given by the Chief Justice in the Court below for holding that the proceeding under section 136 is a penal proceeding, and a punishment for the fraud, even though not in its form a criminal proceeding; and that it can only apply to offences committed in this country. I have not, however, been convinced that we ought on that ground to reverse the judgment appealed from. It is certain that the Act treats the proceeding as a means of enforcing payment of the debt, as well as punitive in its character. In this respect also section 63 agrees with subsection 5 of section 9 of the Act of 1864, when it refers to debts fraudulently contracted as debts "for enforcing the payment of which the imprisonment of the debtor is permitted by this Act." Having regard to this circumstance, and to the fact that the debtor in this case, being domiciled in the Dominion, and in this Province of

the Dominion, as I think we may assume from his being sued here for a debt contracted abroad, was subject to our laws when he contracted the debt, and knew the mode provided by our law for enforcing payment of a debt contracted as this one was, I do not see my way to holding with sufficient clearness to justify the reversal of the judgment of the majority of the Court below, that he can escape from the direct effect of the enactment by reason of his fraud having been committed out of the Dominion.

I therefore agree, though with some hesitation upon the last point, that we should dismiss the appeal, with costs.

MORRISON, J. A., concurred with SPRAGGE, C.J.O.

Appeal dismissed.

THE BANK OF MONTREAL V. GILCHRIST.

Landlord and tenant—Attornment—Title.

S., being indebted to the plaintiffs, entered into an agreement to mortgage to them, amongst other lands, certain lands known as the Dominion Hotel property. A mortgage was on the same day executed, but by mistake the Dominion Hotel property was omitted therefrom, and a lot formerly owned by S. adjacent thereto inserted. The defendant had been the tenant of S., and after the mortgage, attorned and paid some rent to the plaintiffs, believing them to have a title to the lands. In an action for arrears of rent:

Held, affirming the judgment of the County Court of York, that, after such attornment and payment of rent, the defendant could not be heard to deny the plaintiffs' title, and they being the equitable owners of the land were entitled to recover.

Held, also, that the title not being open to question by the defendant, the County Court had jurisdiction.

THIS was an appeal from the judgment of the County Court of the county of York.

The action was brought to recover \$300 for rent, or for the use and occupation of certain premises in Bracebridge, for three quarters, at \$100 a quarter.

The cause was tried without a jury, before the learned County Court Judge, who found a verdict in favour of the plaintiffs.

The facts sufficiently appear from the judgment of Patterson, J. A.

In the following term a rule *nisi* was obtained to set aside the verdict entered for the plaintiffs, and to enter a verdict for the defendant, which was argued and judgment given by the learned Judge discharging it.

From this judgment the defendant appealed.

On March 2nd, 1881, the appeal was argued (a).

Tilt, for the appellants.

Ferguson, Q. C., for the respondents.

The arguments sufficiently appear from the judgment.

The following authorities were referred to: *Smith v. Modeland*, 11 C. P. 387; *Dolby v. Iles*, 11 A. & E. 335;

(a) *Present*.—BURTON, PATTERSON, and MORRISON, JJ.A.

Cobb v. Carpenter, 2 Camp. 13, note ; *Wittrock v. Hallinan*, 13 U. C. R. 135 ; *Rogers v. Pitcher*, 6 Taunt. 202 ; *Doe dem. Marlow v. Wiggins*, 4 Q. B. 367.

November 28, 1881. PATTERSON, J. A.—This is an action to recover \$300 for rent, or for use and occupation, of premises in Bracebridge, for three quarters at \$100 a quarter.

The premises consist of an hotel, called the Dominion Hotel. They belonged to one Shaw, who let them to the defendant for four years from 4th November, 1875, at \$400 a year, payable quarterly in advance. Shaw had once owned adjoining premises on which a building stood, called the "Orange Hall." His firm owed money to the Bank of Montreal, and to secure it, he executed a mortgage to the bank on 10th January, 1879. There was an agreement, preliminary to the mortgage executed by Shaw and other parties, including the bank. It was completed and bore date the tenth of January, 1879, the same date as the mortgage, but it had been prepared some days before that. It described various lands which were to be mortgaged, and amongst others, "lands in the town of Bracebridge, known as the 'Dominion Hotel property,' more particularly described in a mortgage thereof to be executed by the said William James Shaw and wife, if necessary to bar dower, contemporaneously with the execution of this agreement." By some mistake, however, the conveyance, instead of describing the Dominion Hotel property in the mortgage, described the Orange Hall property, which Shaw had ceased to own. The mistake was not discovered for some time, I think not till the summer of 1880, though we are not told how or when the discovery was made.

Shaw became an Insolvent in March, 1879. The rent is said to have been paid him up to within six months of that date. I cannot find precisely how this was from any figures or dates given us, but the matter is not very important.

In the insolvency proceedings the bank retained its security. On 6th October, 1879, the assignee accordingly executed a release to the bank, but in that deed the Bracebridge property was described, as in the mortgage, as the Orange Hall premises. On 9th November, 1879, a clerk of the bank went to Bracebridge to see the defendant respecting the Hotel premises, which were then supposed to belong to the bank. The following extract from his evidence states most of the facts which are immediately material to the present contest :—

“I was directed to inquire for the Bracebridge property, that is, the Dominion Hotel. I examined the property and looked it over and reported on it, and generally looked after it and tried to sell it. Mr. Gilchrist, the defendant, was the tenant then; my business was to see if it wanted looking after in any way, and to see the tenant. Mr. Gilchrist and I talked the matter over, and he shewed me over the house; shewed me where it wanted repairing, and so on, and we made arrangements about its occupancy afterwards. He knew who I represented; I brought a letter from Mr. Yarker; he certainly knew I was representing the Bank of Montreal. I was there both before and after that receipt was given. I saw Mr Gilchrist after I made the arrangement, but I did not talk the matter over with him then. I arranged with Mr. Gilchrist that he was to continue as the bank's tenant on the same conditions as the lease calls for, whatever those might be. He told me there was a balance of \$50 rent due on the last quarter, and said Mr. Shaw had been up there, and he paid Mr. Shaw \$20, and he paid me that balance of \$30 as part of the balance of rent. I came down to Toronto then. Mr. Gilchrist paid \$100 to the bank after that in March, 1880. The \$30 I got in November was rent of the back quarter; it was not in advance; he paid it to Mr. Browning of Bracebridge, and Mr. Browning transmitted it to me, and I turned it over to the bank, returning Mr. Browning a receipt for it; I understood Mr. Browning was acting as agent for the defendant.”

Cross-examined.—"I certainly told Mr. Gilchrist that the Bank of Montreal owned these premises. I demanded it on behalf of the bank. I believe that upon the faith of the bank owning the premises he paid me the \$30; it was undoubtedly on the same representation that he paid me the \$100 afterwards."

The payment of \$100 was made on 5th March, 1880. The quarterly payments under the lease fell due on 4th February, May, August, and November. The \$50 mentioned in the evidence, and spoken of as not being part of a payment in advance, was therefore the balance of the payment due 4th August, 1879. The next payment falling due was therefore that payable in advance on 4th November, 1879. In accordance with this, the \$100 payment is described by Mr. Browning, in the letter of 5th March, 1880, by which he remitted it, as "being rent due for quarter ending 4th ult." The three quarters next falling due would be those of the 4th February, 4th May, and 4th August, 1880. They make the \$300 now sued for. The action was commenced on 30th August 1880. Up to that time the title of the bank was what I have described. Subsequently, namely on 31st August, 1880, the inspectors of the insolvent estate of Shaw ordered the assignee to execute a deed correcting that of October, 1879, by describing the Dominion Hotel property as what was released to the bank, and the assignee executed the deed. The immediate occasion for it was a sale of the property made by the bank to a Mr. Ramsay, in the course of the negotiations for which I suppose the mistake in the original mortgage must have been discovered. The sale to Ramsay was completed in September, and he was paid the November rent by the defendant. The deed of 31st August has been attacked as beyond the power of the inspectors or the assignee to give.

The defence to this action is, that the plaintiffs had no title to the premises: that the defendant is not estopped by his payment of rent to the plaintiffs, because he paid it in consequence of the erroneous assertion that the

plaintiffs owned the premises ; and that the defect of title is not cured by the deed of 31st August.

I agree that the deed does not help the plaintiffs, unless perhaps indirectly as a bit of evidence bearing on the *bona fides* of the previous claim. I form this opinion without inquiring into the powers of the inspectors or of the assignee, because the deed is of a later date than the cause of action, and later than the action itself.

But I am of opinion that the plaintiffs are entitled to recover, notwithstanding the want of legal title.

It is quite clear that all parties honestly believed the bank entitled to the hotel property under the mortgage. I think that under the preliminary agreement of 10th January, 1879, the bank became equitably entitled to have it included in the mortgage. The words I have quoted from the agreement, "more particularly described in a mortgage," &c., refer not alone to the Bracebridge property, they refer also to "certain lands in Toronto, known as the Matthews property," which are also agreed to be mortgaged. I take it that the bank became entitled to the Matthews property and the Dominion Hotel property, and if the mortgage, in place of giving a description of them, more particular than those general words conveyed, happened to omit one of them altogether, which was what was done in this case, the bank's right to the omitted one would remain. I am prepared to go even farther than this. If there had been no written document, but the agreement for the mortgage had been verbal only, and the parties had acted under the honest, though mistaken belief that the property had been covered by the mortgage, and the defendant had under those circumstances attorned to the bank and paid rent as he did, he would, in my opinion, be estopped from disputing the title of the bank without first giving up possession, or what would probably be equivalent to that, being compelled to acknowledge the superior title of some adverse claimant.

The authority of the case of *Doe dem. Marlow v. Wiggins*, 4 Q. B. 367, which was cited by Mr. Ferguson, seems

to me conclusive on this point. There Thompson held premises as tenant of Simpson, who died, devising them to Marlow. Thompson paid Marlow rent in respect of his holding commenced under Simpson, and afterwards made a new agreement to retake the premises from Marlow, and to give up possession on a day named. The defendant Wiggins, who obtained possession under Thompson, offered evidence, in defence of an ejectment suit by Marlow, that Simpson was incapable of making a will. In other words, he wished to prove that Marlow, who had told him he was devisee of Simpson, had not really that title. The evidence was rejected, and the Court in Banc. sustained that ruling.

Lord Denman in his judgment uses this language, at p. 375: "Thompson having possession under the testator, the lessor of the plaintiff comes and claims to be devisee. Thompson admits him to be so; and the admission is acted upon. Afterwards it is contended that the will was a nullity. A case may indeed be supposed where evidence of this kind might be admissible; as if it appeared that the party claiming as devisee had been guilty of a fraud in the making of the will, and in falsely representing it to the tenant as a valid one. I can conceive that, under such circumstances, evidence of the fraud in respect of the will might properly form part of the tenant's case. But no such evidence was offered here. The only attempt was to prove that the will in question was legally no will."

Patteson, J., said, at p. 377: "The defendant has attorned and paid rent to a person who was the actual devisee, and is estopped from disputing his title, according to all the cases. If he wishes to contest it, he must yield up the premises and then bring ejectment."

It was argued by Mr. Tilt that the title to land came here into question, and that the jurisdiction of the County Court was thereby ousted. The view I have been presenting of the plaintiffs' right as against the defendant really disposes of this objection. The relation of landlord and tenant, between the plaintiffs and the

defendant, is proved by the evidence of the attornment and payment of rent. The defence attempted is, that the plaintiffs did not own the land, and that the defendant was induced to attorn and pay rent by being told they did own it. In my view evidence of ownership or of want of title was immaterial. At what stage of the trial ought the Judge to have declined to proceed farther, because title was brought in question? The course would be this: The plaintiffs prove their case without touching the question of title. Then the defendant says, "I contend that the plaintiffs have no title. I am ready to prove that they have no title; but this Court cannot receive that proof; therefore the case must stop." Now without saying one way or other whether this is such a bringing of title into question as would oust the jurisdiction, I think the answer of the Judge should be; "You are not in a position to investigate the plaintiffs' title. You have attorned and paid rent, and the plaintiffs having been guilty of no fraud in asserting that they had title, and no one with a superior title having interfered with the possession which you agreed to hold under the plaintiffs, you are estopped from denying their title in this action."

I think we should dismiss the appeal, with costs.

BURTON and MORRISON, JJ.A., concurred.

Appeal dismissed.

MARGARET WATSON V. BRADSHAW ET AL., EXECUTORS OF
CHESTER POWERS.

Promissory note—Gift inter vivos—Corroboration.

The plaintiff had performed services for one P. in his lifetime, and he, intending to make some recognition thereof told her that a certain promissory note payable to himself or bearer which he produced was hers, saying "Here is your note; take it when you want it." The plaintiff told him to keep it for her, as she had no place in which to keep it herself, and he did so.

Held, affirming the judgment of the County Court, that this constituted a complete gift *inter vivos*, there being a gift, and an acceptance of it by the donee, and actual delivery not being necessary, as in the case of a *donatio mortis causa*.

Held, also, that the plaintiff's evidence was, upon the facts stated below, sufficiently corroborated.

THIS was an appeal from the judgment of the County Court of the united counties of Northumberland and Durham.

The claim was in *detinue*, and for wrongful conversion of a promissory note.

The cause was tried before the learned County Judge and a jury.

The question was, whether there was a gift of a promissory note to the plaintiff by the payee thereof so as to constitute a good gift *inter vivos*.

The note was for \$118, made by Robert Watson, the brother of the plaintiff, and payable to Chester Powers or bearer, twelve months after date.

The evidence, so far as material, is set out in the judgment of this Court.

The jury found for the plaintiff.

In the following term, the defendants obtained a rule *nisi* to set aside the verdict for the plaintiff, and to enter a nonsuit or verdict for the defendants, which after argument was discharged, the learned Judge being of opinion that the evidence established that there was a good gift *inter vivos* of the note.

From this judgment the plaintiff appealed.

On November 8th, 1881, the appeal was argued. (a)

(a) *Present*.—SPRAGGE, C. J. O., BURTON, PATTERSON, and MORRISON, JJ.A.

Moss, Q. C., and *Loscombe*, for the appellant.
J. K. Kerr, Q. C., for the respondents.

November 28, 1881. SPRAGGE, C. J. O.—The question is, whether there was a gift of a certain promissory note to the plaintiff so as to constitute a good gift *inter vivos*.

The note in question is a promissory note for \$118, of which Robert Watson, a brother of the plaintiff, is the maker, and Chester Powers, the alleged donor, is the payee. It is payable to him or bearer twelve months after date.

I incline to think that there was no complete gift of the note at or about the time that it was given; that a gift was then intended by Chester Powers, but that it rested in intention. The plaintiff had nursed Powers in sickness, and he had declared it to be his intention to make her some compensation for her services. He had intended to make her a deed of a piece of land, which had been the subject of bargain between him and the father of the plaintiff and Robert. The father died, leaving the purchase money, \$100, unpaid; and Robert entered and built upon the land. Powers then, out of consideration for Robert, altered the shape of his intended compensation to the plaintiff, and made a deed to Robert, taking his note—the note in question—for the purchase money and interest, declaring his intention to make a gift of it to the plaintiff in lieu of making a gift of the land itself to her.

The plaintiff was aware of all this, and so reckoned upon it as to assume to have something to say to the making of the note, requiring Robert to sign his name in full. It does not appear, however, whether Powers was present when this passed. The note did not then pass into the hands of the plaintiff, but was kept by him among several other papers and notes that he had.

What next passed between Powers and the plaintiff in regard to the note was several months afterwards, the plaintiff says, in June or July of the same year. She thus states what passed :—“ He asked me to bring his papers to him; I brought them to him; he was looking them over,

and when he came to this note he said, 'Here, Maggie, is your note.' I was helping him to read the notes, standing quite near him; he picked up this note and said, 'Here is your note, Mag., take it when you want it.' He held it up in his hand; I was standing just beside him; the note he held up was the note in question. I replied, 'leave it here; I would rather you would keep it, as I have no place for safe-keeping.' He did not make any remark to that." The note did not pass into the actual manual possession of the plaintiff. The alleged donor, however, placed it in her power. He offered it as a gift, and she acquiesced. She requested him to be the custodian of the note for her, and in that request he acquiesced. I take it that the relative position of the parties upon this was, as understood between them, that the note was hers, and that it was in his keeping, not any longer as owner of the note, but because it was safer in his custody than in hers; and that was the real position of the parties, unless it be the law that, in order to the perfecting of the gift, the thing purported to be given, being a thing capable of manual delivery, must pass into the hands of the donee.

There are cases in which this has been held to be necessary as well in the case of a gift *inter vivos*, as this was, as in the case of a *donatio mortis causa*; and, in a note by Mr. Sergeant Manning to the case of *London and Brighton R. W. Co. v. Fuirclough*, 2 M. & G. 691, with respect to gifts of chattels *inter vivos* the rule is said to be this: "Gifts by parol, *i. e.*, gifts made verbally * * are incomplete, and are revocable by the donor, until acceptance, that is, until the donee has made some statement, or done some act, testifying his acquiescence in the gift. * * After acceptance of the gift by parol, and until the disclaimer of the gift by deed, the estate is in the donee without any actual delivery of the chattel which forms the subject of the gift. * * But where a *donatio mortis causa* is made, the property does not vest without delivery." The note continues: "In *Irons v. Smallpiece*, 2 B. & Al. 551, it was held at *nisi prius* by Abbott, J., that a delivery was

necessary to complete a gift *inter vivos*; and, upon a motion by Gurney to set aside the nonsuit, the Court refused to grant a rule, under an impression that the point had been decided in *Bunn v. Markham*, 2 Marshall 532,—the distinction between *donationes inter vivos* and *donationes mortis causa*, (which runs through the previous cases,) not being adverted to."

In the subsequent case, of *Lunn v. Thornton*, 1 C. B. 381, is a note by the same learned reporter pointing out the same distinction between the two classes of gifts, and adding—"In *Irons v. Smallpiece*, had not these distinctions been overlooked, a rule would no doubt have been granted."

I should not have quoted these notes of Sergeant Manning but that the latter one of the two has been referred to by Parke, B., Lord Wensleydale, with approbation, in the case of *Flory v. Denny*, 7 Ex. 581, 583. And there is no doubt, I think, looking at the authorities to which the learned Sergeant refers, that his notes to the two cases referred to are a correct statement of the law. The truth is, that *Irons v. Smallpiece* and the later case of *Shower v. Pilck*, 4 Ex. 478, are exceptions to the current of authority, and were evidently decided as they were from an omission to distinguish the two classes of gifts. There is, I think, no room for doubt that, upon the evidence of the plaintiff, there was a gift by Powers and an acceptance of the gift by the plaintiff.

In *Winter v. Winter*, 4 L. T. N. S. 639, the rule was stated and agreed to, that actual delivery is not necessary in a gift *inter vivos*; and in our own Courts the same principle is affirmed in *Regina v. Carter*, 13 C. P. 611; *Viet v. Viet*, 34 U. C. R. 104; and *Kerr v. Read*, 23 Gr. 525.

Corroboration of the evidence of the plaintiff was, of course, necessary.

In *Watson v. Severn*, ante p. 559 in which judgment has just been given, I have referred to the judgment of Sir James Hannen as to the nature and extent of corroboration required.

The evidence of Wilson Powers, a nephew of the

donor, affords, I think, ample corroboration of the plaintiff's case. After speaking of the intention of his uncle to make a gift of the land to the plaintiff, and his suggestion, approved by other friends, to substitute for the land a note to be given for the purchase money, he narrates what passed between himself and his uncle in the fall of 1879 in regard to the note which had been so given. A party called and wanted to renew some past due notes. The witness says: "I was called up to renew the notes, and among the rest I found this note of Watson's. I asked him," he says, "what he was going to do with that note. He just turned himself over on the bed, and said—'That note belongs to Mag., and she can do as she pleases with it.'"

The intention to give the land, the substitution of the note given for purchase money for the land itself, and what passed between Chester Powers and his nephew in 1879, are all circumstances leading to the conviction that the plaintiff's evidence is truthful. The intention to give the land to the plaintiff, and the substitution of a note for purchase money, are circumstances spoken to by Robert Watson, as well as by Wilson Powers.

There was some evidence given by the defendants of conduct and language on the part of the plaintiff, tending to shew, as the defendants contended, that there was no gift of the note in question. The jury, however, upon the charge of the Judge must have found such facts in the plaintiff's favour as would in law entitle her to the note as a gift from Chester Powers. The learned Judge did indeed charge that it was necessary to prove valuable consideration; but that was imposing a larger burthen of proof upon the plaintiff than the law requires; and he did put it to the jury that they must be satisfied that the note was the plaintiff's property delivered to her by the deceased, he understanding he was giving it to her for wages and she understanding she was receiving it for wages. Strike out the words "for wages" and all that the charge contains about valuable consideration, and the

jury were told that they must find certain facts and that the plaintiff's evidence upon those facts must be corroborated. If the jury found such facts, as they were told they must find, (independently of the question of valuable consideration,) they would find all that was necessary to constitute a good gift *inter vivos*.

But if this were less apparent than it is, we find that the charge was not objected to by the defendants. They took the chance of a verdict in their favour from the assumed necessity of the plaintiff proving valuable consideration as put by the Judge, and they cannot now complain; and we see now that such evidence was given by and on behalf of the plaintiff, as was sufficient if credible—as the jury must have found it to be—to entitle the plaintiff to a verdict.

In my opinion the appeal should be dismissed, with costs.

BURTON, PATTERSON, and MORRISON, JJ.A., concurred.

Appeal dismissed.

GRIFFITHS AND WEST v. GEORGE PERRY, ASSIGNEE OF
ALEXANDER AND JAMES MURRAY, INSOLVENTS.

Insolvent Act of 1875, secs. 130, 132, 133—Fraudulent preference.

The plaintiffs, who were sub-contractors for the stone and brick work of a public school, and who were to receive payment from the principal contractors, who alone were recognized by the public school board, procured an assignment to themselves of the balance due them by the contractors for their completed work, and payable to the contractors by the board. The contractors were at the time unable to pay their debts, which the plaintiffs knew, and an attachment in insolvency issued against them within three months after the assignment of the claim.

Held, affirming the judgment of PROUDFOOT, V. C., that the transaction was an unjust preference under sec. 133 of the Insolvent Act of 1875; and, *Semhle*, that it was also within the meaning of secs. 130 and 132, and the plaintiffs could not maintain a suit to enforce payment of the balance assigned to them.

THIS was an appeal from the judgment of Proudfoot, V. C.

The insolvents being desirous of tendering for the erection of a public school, and not wishing to include in their tender the mason and brick work, applied to the plaintiffs for an estimate of the amount at which they would agree to perform that work necessary to the specifications. These tenders were put in separately, but the School Board being desirous of letting the whole work under one contract, the insolvents included the amount of the plaintiffs' estimate in their tender, which was accepted, and the contract for the whole work awarded to the insolvents. The plaintiffs then agreed with the insolvents to perform the mason and brick work for the amount of the estimate included in the tender, the understanding being that they were to receive the whole amount promised for this work, and that the insolvents were to receive no direct benefit from their work. Payments were from time to time made to the insolvents under their contract, a portion of the amount received being paid by the insolvents to the plaintiffs. There being a large sum due to the plaintiffs for work done under the contract, and a balance due by the School Board to the insolvents, the plaintiffs obtained from the insolvents an assignment of such balance to the

extent of the sum due to them, the plaintiffs. The insolvents were at the time of the arrangement unable to pay their debts, of which the plaintiffs were aware; and an attachment in insolvency issued against them within three months after the date of the assignment.

The additional facts, so far as material, are stated in the judgment of Patterson, J. A.

The case was heard before Proudfoot, V. C., who made a decree in favour of the defendant, holding that the assignment was fraudulent and void as against the defendant, the assignee in insolvency, as being an unjust preference under section 133 of the Insolvent Act of 1875; and the plaintiffs could not maintain a suit to enforce payment of the amount assigned to them.

From this judgment the plaintiffs appealed.

On January 14th, 1881, the appeal was argued (a).

Bain, for the appellants. The grounds upon which the assignment to the appellants is attacked amounts, at the most, to an unjust preference within the meaning of sec. 133 of the Insolvent Act of 1875, and the case is not brought within either secs. 130 or 132 of the Act. The evidence fails to establish that the assignment was made in contemplation of insolvency, or that the applicant obtained any unjust preference over the insolvents' creditors, or that there was any intention on the part of the insolvents to give the appellants a preference over their other creditors; and the onus of proof is on the respondent. The evidence also failed to shew that the assignment to the appellants was fraudulent and void, as against the respondent, under the provisions of any other section of the Insolvent Act relating to frauds or fraudulent preferences, even if it were open to the respondent to claim the benefit of any of the said sections, other than sec. 133. The evidence shews that under the arrangement made between the insolvents and the appellants, the sub-contractors, the insolvents, were to receive no profit or

(a) *Present*.—BURTON, PATTERSON, and MORRISON, JJ. A., and OSLER, J.
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advantage from the portion of the work to be performed by the appellants; and when they, the insolvents, entered into the contract with the School Board the insolvents agreed with the appellants to give them an order on the School Board for the amount they, the insolvents, were to receive from the School Board for the portion of the work and materials the appellants had agreed to furnish. The appellants then, on the faith of this agreement, entered upon and performed the said portion of the work, and the insolvents in making the assignment of the moneys which accrued due for the portion of the work, were carrying out the agreement, and doing what it was their duty to do, and the appellants only obtained what they had contracted for and were entitled to receive. Neither the insolvents, therefore, nor the defendant, as assignee in insolvency, as representing the creditors, had any right or interest in the moneys so assigned, and they were not entitled to have the said moneys declared to be part of the insolvents' estate. Under these circumstances the creditors were not delayed, defrauded, or injured; nor did the appellants acquire any unjust preference over the other creditors. The assignment therefore is valid as against the respondent, and should not be set aside.

Walter Cassels, for the respondents. The assignment by the Murrys to the appellants cannot be supported. It was made without consideration and gratuitous, and was made within three months of the issuing of the writ of attachment. The appellants knew, or had probable cause for believing at the time they took the assignment, that the Murrys were unable to meet their engagements, and they afterwards became insolvent. The effect of the assignment was, that the creditors were injured, obstructed, and delayed. The appellants also by such assignment obtained an unjust preference over the other creditors of the Murrys, and it was made in contemplation of insolvency. Under the circumstances the assignment is void under sec 133 of the Insolvent Act of 1875. The evidence clearly sustains the finding of the learned Vice-Chancellor.

But even if the evidence is conflicting, the Court will not interfere with the view taken of the evidence by the Judge who heard it, if it is such, as it clearly is, as may sustain his view.

Buin, in reply.

November 28, 1881. PATTERSON, J. A.—The contest in this case arises out of matters connected with a contract taken in February, 1879, by the insolvents, for the erection of a school-house in Woodstock, for the Public School Board of that town. The contract price was \$13,830, payable at the rate of 85 per cent. on the monthly progress estimates and certificates of the architect, and the remaining 15 per cent. in one month after the completion and acceptance of the works. The contract price was computed by adding together the estimate made by the insolvents for the carpenter work, and the estimates of the several persons who were to do the other departments of the work. The plaintiffs undertook the stone and brick work and plastering. Their estimate was \$6,960, as stated by themselves in their evidence, or as stated by the contractors \$6,360, to which the sum of \$600 was to be added if they did the slating. There was no written agreement between the insolvents and their sub-contractors. The verbal understanding was that each sub-contractor was to receive his proportion of each monthly payment, at the rate of 85 per cent., for such of his work as was included in the progress estimate. The School Board was no party to this arrangement, and in fact expressly refused to recognize any but the one entire contract. The architect made no separation between the different trades in his certificates; and the distribution of the money each month was therefore left to depend on the calculations of the insolvents. The plaintiffs profess to have been dissatisfied with the amounts they were receiving from time to time; but it does not seem very clear whether they always blamed the insolvents for dividing unfairly, or sometimes blamed the architect for certifying for too small amounts. At the

beginning of November, 1879, the plaintiffs had substantially finished their part of the work, but the whole work, which was to have been completed by 15th November, was not done at that time, and in fact was never completed by the insolvents. An attachment in insolvency issued against them on 5th February, 1880, and on that day or a few days later the School Board took the work out of their hands and made other provision for proceeding with it. I understand that the amount to become payable to the insolvents or their assignee, when the work should be finally completed, was about \$3000.

On 21st November, 1879, the plaintiffs obtained from the insolvents an assignment of the sum of \$2,365, part of the amount to become payable by the school board. They claimed that that sum was due to them, though part of it, representing at least the 15 per cent., was not payable then.

The present bill is filed to enforce payment of this sum.

Some question seems to exist between the plaintiffs and the insolvents as to whether so large a sum as \$2,365, was due to the plaintiffs. The principal contest however is whether the assignment is valid or invalid in view of the provisions of the Insolvent Act of 1875.

The decree in the Court below declares it to be *fraudulent and void* as against the assignee in insolvency as being a *fraudulent preference* under the Insolvent Act.

I apprehend that what is intended by the use of the words I have italicized is to declare that under the provisions of the 133rd section, which deals with unjust preferences, but does not use the word fraud or fraudulent, the assignment was made in contemplation of insolvency: that it gave to the plaintiffs an unjust preference over the other creditors of the insolvents: and that it was therefore null and void.

These conclusions are challenged by the plaintiffs; and their appeal thus raises two questions, both of which are questions of fact more than of law: Was the assignment made in contemplation of insolvency? and did the plaintiffs obtain by it an unjust preference over the other creditors?

We have had the advantage of a very full discussion of the evidence bearing upon these questions, and upon one or two other topics not so directly in question under section 133, such as the knowledge which the plaintiffs had when they took the assignment of the embarrassed condition of the insolvents; and since the argument I have carefully read over all the evidence, and I am unable to say that the finding of the learned Vice-Chancellor is not in accordance with the evidence. The pecuniary embarrassment of the insolvents is very distinctly shewn. There is no indication of any hope existing on their part in November of being able to surmount their difficulties, except by means of aid from a relative, which prospect was destroyed by reason of claims made by the plaintiffs, which the insolvents did not admit. There is plenty of evidence that the plaintiffs knew all about the affairs of the insolvents so far as their want of means was concerned; and there is in the details given of the proceedings which ended in the execution of the assignment of the \$2,365 to the plaintiffs, enough to justify even if it did not compel the conclusion that it was made in contemplation of insolvency.

It was contended that the preference obtained by the plaintiffs over the other creditors was not unjust, because there had been some understanding or agreement when the contract was first made that the plaintiffs were in some way to be secured. I cannot find even in the evidence of the plaintiffs themselves anything definite on this subject. I gather that the original intention of the insolvents was to give orders to the several sub-contractors upon the School Board, to enable them to receive their money directly from the board, an arrangement which would have served as security to the sub-contractors, and would at the same time have relieved the insolvents of some trouble. The board, however, would not agree to do business in this way. I do not find that the plaintiffs had any understanding or arrangement different from this, which was only a project that proved abortive, but which did not in any point of view make it just that they should be paid

in the end in preference to the others. Had they been able to shew that the assignment executed in November was merely the carrying out of an agreement made the previous February, the relation back to the earliest date might have availed them, in case the insolvency had occurred within thirty days after the execution of the deed, as removing the presumption that it was made in contemplation of insolvency; but it would leave untouched the question of the injustice of their obtaining a preference over their fellow sub-contractors, or even over the general creditors. On this point, however, as on all matters depending on the evidence, our duty on this appeal is limited to saying whether the whole evidence warrants the finding, and not whether the plaintiffs' evidence, if uncontradicted, might support a different conclusion; and the evidence of the plaintiffs, who do not always agree in their understanding of details, is not by any means left without contradiction.

My opinion is that, assuming the case to turn on the 133rd section, there is no sufficient ground shewn for interference with the decision of the learned Vice-Chancellor. But I am not satisfied that the plaintiffs are out of the range of sections 130 and 132.

One provision of section 130 is, that "all contracts by which creditors are injured, obstructed, or delayed, made by a debtor unable to meet his engagements, and afterwards becoming an insolvent, with a person knowing such inability or having probable cause for believing such inability to exist, * * whether such person be his creditor or not, are presumed to be made with intent to defraud his creditors."

Now, to take the transaction in question out of this description, it would be absolutely necessary to disbelieve a good deal of very direct evidence. The creditors, to whom the plaintiffs left scarcely a shell after securing the kernel for themselves, were, one would say, injured, obstructed, or delayed by the contract which is now impeached. The debtors were unable to meet their engagements to many

persons, amongst whom were the plaintiffs. The plaintiffs thus knew of the inability, and are proved by other evidence to have known of it. The presumption therefore, under section 130, would seem to be that the assignment was made with intent to defraud the creditors of the insolvents. The consequence of this is declared by section 132. "All contracts, or conveyances made and acts done by a debtor, respecting either real or personal estate, * * with intent to defraud his creditors, or any of them, and so made, done, and intended with the knowledge of the person contracting or acting with the debtor, whether such person be his creditor or not, and which have the effect of impeding, obstructing, or delaying the creditors of their remedies, or of injuring them or any of them, are prohibited, and are null and void." Here we have three requisites: the intent to defraud, which is presumed, under section 130; the knowledge of the plaintiffs of that intent, evidenced by their proved design to secure themselves in full, coupled with their knowledge of their debtors' inability to pay all their debts; and the impeding, obstructing, and delaying the other creditors, who were left without assets to which to resort for payment of their debts.

We have not been informed of the precise grounds upon which the decision in the Court below proceeded. In my judgment we have no sufficient reason for disturbing it, whether it was based on section 133, or on sections 130 and 132.

I think the appeal should be dismissed, with costs.

BURTON and MORRISON, J.J.A., and OSLER, J., concurred.

BOOTH V. PRITTIE.

Contract not to be performed within a year—Statute of frauds—Defeasible contract.

Held, reversing the judgment of the County Court of York, that a contract of hiring for a year or more defeasible within the year, is within the fourth section of the Statute of Frauds.

The agreement, as alleged by the plaintiff, was made in February, 1880, whereby defendant was to pay him for his services while he should remain in defendant's employment, at the rate of \$500 a year, for one year, and thereafter at such salary as might be agreed upon; the plaintiff to enter upon his duties, and his salary to commence on the 3rd of March, then next, and defendant was to be at liberty to determine the employment at the expiration of a month named, otherwise the agreement to remain in full force for a year, and for such longer period as might be agreed upon.

Held, clearly within the statute.

This was an appeal from the judgment of the County Court of the County of York.

The first count of the declaration set out that it was agreed between the plaintiff and the defendant that the plaintiff should enter into and continue in the service of the defendant, and that the defendant should retain the plaintiff in such service in the capacity of an agent, until the expiration of a reasonable notice to be given by either of them to the other, &c., at a salary at the rate of \$500 a year, to be paid by the plaintiff, &c. Breach: that the defendant did not and would not receive the plaintiff in his service, whereby, &c.

The second and third counts are not material, as they were struck out at the trial.

The pleas were *non assumpsit*, and never indebted.

The cause was tried before the County Judge and a jury.

At the trial it appeared that in November, 1879, negotiations took place between the plaintiff and defendant as to exchanging certain properties on the Kingston road for a one-tenth undivided interest in what was known as the Little Saskatchewan or Rapid City property, and \$1,200 cash; the plaintiff to be sent out as agent of the defendant to Manitoba, at a salary at the rate of \$500 per year. No length of time was mentioned.

The plaintiff said that a verbal agreement was then entered into, but this was denied by the defendant.

The plaintiff said, "the hiring was to commence immediately after the transfer of the property. That was my understanding most decidedly. I understood I was to get a salary from that date. I was under his engagement the moment the transfer was completed."

On the 15th of January, 1880, the following written agreement was entered into :

"This agreement, made this 15th day of January, 1880, between Samuel Booth, of the City of Toronto, builder ; and Robert Woods Prittie, of the same place, Manitoba emigration agent.

"Witnesseth, that said Booth agrees to sell the following properties to said Prittie, subject to the mortgages, the amount of which is set after each, but free from taxes and arrears of payments or interest, viz. : The dwelling house occupied by himself, corner of Kingston road and Boulton street, \$3,000 ; three stores, north side Kingston road, \$1,800 ; store corner of DeGrassi street, and two cottages north of the same, \$1,400 ; two cottages still further north on DeGrassi street, \$250 ; three cottages on McGee street, city, \$250 ; and one vacant lot on Boulton street, free from incumbrances : and in payment thereof said Prittie agrees to pay said Booth \$1,000 as soon as the conveyances are completed, and to deed to said Booth one undivided tenth part or interest in 2,960 acres of land in Township 13, range 20 west, known as the Little Saskatchewan Property, in the North-West Territory. It is understood that if said Prittie cannot arrange to get the money mentioned above, he is to notify Booth by noon to-morrow, when this agreement shall become void."

(Signed) S. BOOTH, [L.S.]

R. W. PRITTIE. [L.S.]

Signed and sealed in the presence of Archibald Young.

After the transfer of the property, the plaintiff began to press the defendant to carry out the alleged verbal agreement, and to send him out to Manitoba. A number of excuses were put in by the defendant, and among others that he had sold a portion of the same land to other parties, and that they were equally liable to the plaintiff, and defendant advised him to prepare an agreement ; and he the defendant would get the other parties interested to sign it. In consequence of this, the plaintiff prepared and left with the defendant the following agreement :

"This agreement, made the _____ day of February, 1880, between _____ of the first part, and Samuel Booth, of the City of Toronto, in the County of York, of the second part.

"Whereas the parties hereto, of the first and second parts, are joint

owners of certain lands in the vicinity of Rapid City in the North-West Territories of the Dominion of Canada, and it has been agreed between them that the said party of the second part shall go out to the said North West Territory to look after and superintend the interests of the said parties of the first and second parts in the said lands, and that the said parties of the first part shall remunerate him therefor by a salary at the rate of \$500 per annum, over and above his travelling to and from the said North-West Territory and in connection with the said business: Now, therefore, this Indenture witnesseth that in consideration of the premises and of the covenants hereinafter contained on the part of the party hereto of the second part, the said parties of the first part, each for himself, his heirs, executors, administrators, and assigns, covenant and agree with the party of the second part to employ him, and do hereby employ him in the capacity of superintendent and manager of their business and interest in connection with certain lands jointly owned by them and the said party of the second part in the vicinity of Rapid City, in the North-West Territory of the Dominion of Canada.

"The duties of the said party of the second part will be the making of roads, building of bridges, selling lots, and generally to manage and superintend all labor and work performed on behalf of and in the interest of the parties to these presents.

"And the said parties of the first part do further covenant and agree to pay the said party of the second part, for and during the time he shall remain in their employment, until the expiration of one year from the date hereof, at the rate of \$500 per annum; and also his travelling expenses to and from the said North-West Territory, and his necessary travelling expenses in connection with the business of the parties hereto of the first part, under and after the expiration of the first year at such salary as may be from time to time agreed upon; the said party of the second part to enter upon his duties, and his said salary to commence, from the third day of March next.

"And the party hereto of the second part, for himself and his heirs, executors, administrators, and assigns, in consideration of the said salary and employment, doth covenant and agree with the said parties of the first part, that he will serve them in the capacity aforesaid, from the said third day of March next, for and during the period hereinafter specified, and will faithfully and diligently occupy himself in the superintendence and management of the business of the said parties of the first part in the North-West Territory, and in attending to their interest, and looking after their business generally in connection with the aforesaid lands.

"And it is further agreed by and between the parties hereto, that the said party of the second part shall be at liberty to determine his said employment, under this agreement, at the expiration of the month of , 1880; otherwise this agreement to remain in full force for the period of one year from the date hereof, and for such longer period as may from time to time be agreed upon."

Other evidence was called to corroborate the plaintiff's statement by admissions of the defendant.

The jury found for the plaintiff with \$200 damages.

In the following term the defendant obtained a rule *nisi* to set aside the verdict for the plaintiff, and to enter a verdict for the defendant. The rule was subsequently argued, and the learned Judge gave judgment discharging it.

The learned Judge of the County Court, in giving judgment discharging the rule *nisi*, said :

"If the jurisdiction of the Court permitted it, the amount of the verdict should be larger ; the justice of the case is with the plaintiff. I left it to the jury to say whether the hiring was as alleged by Mr. Booth in his evidence ; if so, it was to have effect immediately, and need not be in writing, and the case was made out for the plaintiff. If it was not to take effect immediately, and to commence on a future day, for a year, the verdict should be for the defendant, for want of meeting with the Statute of Frauds ; and the verdict should be for the defendant if the jury could rely on the evidence of the defendant Prittie. The jury did not rely on the evidence of the defendant, and I am not surprised at it. The verdict should stand for the plaintiff on the first count."

From this judgment the defendant appealed.

On September 7, 1881, the appeal was argued (a).

James MacLennan, Q. C., for the appellant. The agreement sued on (if any) is for a year, and not being in writing, and to commence at a future time, is within the Statute of Frauds, and therefore cannot be enforced. The agreement, as made out by the respondent's evidence, is for a hiring at a yearly rate, and is therefore construed as for a year ; and as it was to commence at a future time it cannot be enforced. A general hiring at a yearly wage is a yearly hiring : *Giraud v. Richmond*, 2 C. B. 835 ; *Fozall v. International Land and Credit Co.*, 16 L. T. N. S. 637 ; *Beeston v. Collyer*, 4 Bing. 309 ; *Lilley v. Elwin*, 11 Q. B. 742 ; *Fawcett v. Cash*, 5 B. & Ad. 904 ; *Addison on Contracts*, 7th ed., pp. 154-6, 684 ; *Agnew's Statute of Frauds*, 178, 183, 184.

John MacGregor, for the respondent. The action is for damages sustained by the plaintiff by reason of the defen-

(a) *Present*.—SPRAGGE, C. J. O., BURTON, PATTERSON, and MORRISON, JJ. A.

dant having refused to carry out his agreement to employ the plaintiff at a salary of \$500 a year. The plaintiff is entitled to recover : *Hochster v. De La Tour*, 2 E. & B. 678. The hiring in this case was to commence from the transfer of the property. The question is, what does the plaintiff mean by the expression "The transfer of the property?" The plaintiff meant not from the date of the execution of the deed, but from the time when the defendant took actual possession of the property, which by the agreement was the 16th of January, 1880. This question ought not to interfere with the finding. The agreement spoken of by the plaintiff in his evidence as having been made in November, 1879, was, as appears from the agreement of the 15th January, a conditional one, in which the plaintiff agreed if the defendant took his property he would accept his offer to go to Manitoba as his agent, at the rate of \$500 per year. Everything connected with the exchange of properties and hiring remained open until noon of the 16th, as the last clause of the agreement shews, which states, after providing for the exchange of the properties : "It is understood that if said Prittie cannot arrange to get the money mentioned above, he is to notify Booth by noon to morrow, when this agreement shall become void." The plaintiff does not contend that if Prittie at 11 o'clock on the 16th, had exercised his right to withdraw, and signified his inability to raise the money, that there was a hiring at noon on the 16th January, 1880. Prittie not having notified Booth of his inability to raise the money, became entitled to the property as from the day before, and the term of hiring commenced from the day before, which was the 15th January, and as Prittie collected the rents from the date of the agreement, the actual manual transfer of the property took place from that date. The agreement of February, 1880, on which the defendant relies, does not shew an agreement for a year. It provides for a hiring of service in the capacity of agent, "from the third day of March next, for and during the period hereinafter specified." And in the last clause of this agreement, it states : "This agreement to remain in full force for the period

of one year from the date hereof," namely, February. Then the term of the service under that agreement is from March until one year from the date, namely, February. This would be for a term less than a year. There is no absolute rule of law that a hiring at a certain yearly rate is a hiring for a year, but it is a question to be left to the jury to say what the term was: *Baxter v. Nurse*, 6 M. & G. 935. Where the law implies a yearly hiring, the Statute of Frauds does not apply: *Fairman v. Oakford*, 5 H. & N. 635; *Beeston v. Collyer*, 4 Bing. 309. The agreement sworn to by the plaintiff, was a hiring at the rate of \$500 a year. The year is only mentioned to fix the rate of remuneration. If the agreement had been to hire him at the rate of \$250 a half year, could it be contended that it was an absolute hiring for six months? If then there is a yearly hiring, it is one not arising from express words, but by implication of law; therefore the above authorities apply.

MacLennan, Q.C., in reply.

November 28, 1881. SPRAGGE, C. J. O.—The jury has found that there was a hiring of the plaintiff by the defendant, and for which they have given damages.

The question is, whether the hiring alleged, and as the jury found proved, was within section 4 of the Statute of Frauds.

There was a negotiation for a hiring in November, 1879. It is immaterial whether it amounted to an agreement for hiring or not; as there was certainly an agreement for hiring on the 15th of January, 1880. At that date there was a written agreement for the transfer of certain property by the plaintiff to the defendant; and the plaintiff suggested that the agreement for hiring ought to be embodied in that agreement. The defendant objected on the ground, the plaintiff thinks, so he states in his evidence, that it would interfere with the sale of the property; and the plaintiff adds, "that had nothing to do with the agreement of hiring, except that the transfer of the property and the hiring were part and parcel of the same agreement."

Further on he says: "I made the agreement about the hiring with him first of all. I spoke about the transfer of the property or buying the property somewhere in November. I understood the agreement for hiring was understood on the spot before this paper was signed." The paper here spoken of is the agreement of 15th January. "The hiring was to commence immediately after the transfer of the property, that was my understanding most decidedly; I understood I was to get a salary from that date. I was under his engagement the moment the transfer was completed."

The transfer here spoken of bears date 27th January, 1880. The execution was certainly not before that date, probably in the following month, as appears by the evidence of Mr. Meyers.

According then to the evidence of the plaintiff himself there was on the 15th of January, if not before, an agreement for future hiring and service, the service to commence upon or after a future transfer of property, which transfer was made on or after the 27th of January. If the service was to be for a year after the transfer, or to be for over a year from the date of the agreement, it would be within the Statute of Frauds. If to be completed within a year from the date of the agreement, it would not be within the statute: *Hochster v. De La Tour*, 2 E. & B. 678; *Bracegirdle v. Heald*, 1 B. & Al. 722, following *Boydell v. Drummond*, 11 East 142; and there are other cases to the same point.

The hiring was at the rate of \$500 a year. *Prima facie* that would be a hiring for a year; but we have in this case something more definite to go upon than an inference from the hiring being for so much a year. The draft of an agreement is put in, which the plaintiff says was the one that "he had prepared to sign." The words import that he had the instrument prepared in order to its being signed; and there is no suggestion that it was prepared at the instance of the defendant or of any one but the plaintiff. There could be no better evidence of what he claimed to

be the true agreement than his having one prepared in writing, and asking for its execution. Its date is the of February, 1880, and after reciting an agreement that he should be remunerated for his services at the rate of \$500 a year, there follows a covenant to pay to the plaintiff for and during the time that he shall remain in their employment (*i. e.*, in the employment of the parties of the first part) until the expiration of one year from the date hereof, at the rate of \$500 per annum, also his traveling expenses * * under and after the expiration of the first year at such salary as may from time to time be agreed upon; the said party of the second part (the plaintiff) to enter upon his duties, and his said salary to commence from the 3rd day of March next." Then follows a covenant for the faithful and diligent discharge of duty by the plaintiff; and then this provision: "And it is further agreed by and between the parties hereto that the said party of the second part shall be at liberty to determine his said employment under his agreement at the expiration of the month of , 1880; otherwise this agreement to remain in full force for the period of *one year from the date hereof*, and for such longer period as may from time to time be agreed upon."

Apart from the effect of the "liberty" to determine the "employment" within the year, there can be no doubt that, as put by Grose, J., in *Boydell v. Drummond*, 11 East 142, at p. 157, "It is impossible to say that the parties contemplated that the work was to be performed" (in this case the employment determined) "within a year;" or as put by Bayley, J.: "It was clearly the understanding of all parties that the contract was not to be performed within a year."

In that case what was contemplated and what was understood was to be gathered from the whole of the terms of the contract; the period of a year was not mentioned in it.

In that respect *Bracegirdle v. Heald*, 1 B. & Al. 722, more nearly resembles this case. The alleged hiring in that case

was on the 27th of May, for the plaintiff to go into the service of the defendant on the 30th of June following, to serve him for a year. All the learned Judges held that the case was clearly within section 4 of the statute, and that *Boydell v. Drummond* was rightly decided, and I have seen no case since impeaching the authority of those cases.

The cases of *Baxter v. Nurse*, 6 M. & G. 935, and *Fairman v. Oakford*, 5 H. & N. 635, cited for the plaintiff, are cases in which the statute did not come into question as a point for decision. They were cases in which the question was, what were the terms of hiring; and what was the notice to which a person who had served the defendant, and been dismissed, was entitled. *Beeston v. Collyer*, 4 Bing. 309, was a case in which the question was the same. It is cited for an observation of Best, C. J., that the contract in that case had been proved by acts from which the contract would be implied, and that being implied it was not necessary that it should be in writing. The observation has no application to this case, inasmuch as the alleged contract is not in this case proved by acts at all. *Hochster v. De La Tour*, 2 E. & B. 678, I have already noticed.

If the point in this case were one of first impression it could not, in my judgment, have been decided otherwise than it was decided in *Boydell v. Drummond*, and *Bracegirdle v. Heald*.

It remains to be considered whether a provision that a hiring for a year may be determined by notice, takes the case out of the statute. The most direct authority upon this point is the case of *Dobson v. Collis*, 1 H. & N. 81. The contract, a verbal one, was for a hiring until the 1st of September, 1855, and for a year thereafter, unless the employment were determined by the giving of three months' notice by either party. Notice was given by the employer; and upon action being brought upon the contract of hiring, his contention was that the contract was for service for more than a year, and that the circumstance that the contract *might* be determined within the year did not take the case out of the operation of the Statute of

Frauds; and the learned Judge at the trial, and the Court in term, agreed with him. There are other cases supporting the same doctrine, that the circumstance of the contract being defeasible, and that it may be defeated and put an end to within the year, does not take the case out of the operation of the statute. I may mention upon this point *Roberts v. Tucker*, 3 Ex. 632, and *Birch v. Earl of Liverpool*, 9 B. & C. 392, cited in *Dobson v. Collis*, 1 H. & N. 81; *Eley v. Positive Assurance Co.*, L. R. 1 Ex. D. 20; *Sweet v. Lee*, 3 M. & G. 452; *Farington v. Donohoe*, 1 Ir C. L. R. N. S. 675; *Giraud v. Richmond*, 2 C. B. 835; and *Ex parte Acraman*, 31 L. J. N. S. Ch. 741-5.

In my judgment this case is very clearly within section 4 of the Statute of Frauds. I have not gone out of the parol evidence of the plaintiff himself, and the draft of agreement produced by himself; and upon that, in my opinion, the plaintiff ought to have been nonsuited.

If it were necessary to go out of the law of the case I should say, looking at the charge of the learned Judge, as stated by himself, that the case went to the jury in a way disadvantageous to the defendant, and that it would be proper to grant a new trial.

The draft of agreement assumes that the contract was with more than one as contended for by the defendant.

BURTON, PATTERSON, and MORRISON, JJ.A., concurred.

Appeal allowed.

FREED V. ORR ET AL.

Land of testator—Liability to sale under execution—Fraud—Costs—Bringing non-appealing parties before court—Month's notice of appeal—Limitation of time to appeal.

The land of a testator or intestate is liable to be sold only for his debt, and where it is shewn that the judgment was not in fact recovered in respect of such a debt, but that the execution creditors never were creditors of the deceased, a sale of such land under it cannot be supported.

Fraud having been charged against a defendant, who was a solicitor, and the charge being wholly unsupported: *Seemle*, that it would have been proper not merely to deprive the plaintiff of her costs, but to allow such defendant all his costs.

Two only of several defendants appealed. The respondent by her reasons against the appeal claimed relief over against two of the other defendants to the suit, and served them with the reasons against appeal, and subsequently with the printed appeal book, and with notice of setting down the appeal for argument. These defendants had never been served with the statutory month's notice of appeal, nor furnished with security for the costs of the appeal, nor afforded an opportunity of taking part in the settlement of the appeal book.

Held, that they were properly before the Court.

Where a decree was made at the hearing of a case, but certain questions were reserved for further directions: *Held*, that the year within which an appeal could be brought ran from the making of the decree on further directions and not from that on the hearing.

THIS was an appeal from the judgment of Blake, V. C.

The bill of complaint against several defendants was filed to set aside a judgment at law and the sale of the lands made thereunder, and to have the said lands delivered up to the plaintiff freed and discharged from all incumbrances, &c.

The facts were as follows:

John Orr was seized of lot No. 4 on the south side of Lot street, now Queen street; and while so seized he died in the month of February, 1859, having first made his will, dated the 19th of January, 1859, as follows:

"I give and bequeath unto my beloved wife Eliza, or her administrators and assigns, all my household furniture, whatsoever and wheresoever, to the use of her and her assigns forever.

"Secondly,—I give, devise, and bequeath unto my daughter Eliza Orr, and her heirs, all my real estate, known as Lot No. 4, on the south side of Lot street, now Queen street, together with the appurtenances appertaining thereto, to hold to her the said Eliza Orr and her heirs forever; and if my said daughter should die without lawful issue, then I devise and bequeath the said property to be divided amongst my brother William Orr's children.

"Thirdly,—I devise and bequeath that the rent and profits of my real estate so devised to my daughter, shall be received by my wife during

her natural life, or so long as she remains my widow, for the support of her and my said daughter, and after the death or marriage of my said wife, then the same is to go to my said daughter. And I appoint Edward Lennox, of the city of Toronto, and Jeremiah Carty, of the city of Toronto, executors of this my will."

Edward Lennox and Jeremiah Carty proved the will, and took upon themselves the burden of execution thereof.

Eliza Orr, wife of the testator, John Orr, died, in January, 1864, in possession of the said real estate.

The plaintiff was the daughter of the testator, John Orr, and devisee of the said lands mentioned in the will, and was married to her present husband, Henry Freed, on the 24th December, 1873, and attained her majority on the 12th of August, 1874.

The defendant Annie Maria Orr, on the death of the plaintiff's mother, was appointed the guardian of the plaintiff.

The plaintiff, who was then about eleven years of age, at the request of the defendant Annie Maria Orr, went to reside with her in the city of Hamilton, and continued to reside with her from that time until the year 1870. During this time, as the plaintiff contended, she, with the exception of about six months when she was at school, performed the household work, receiving no wages therefor; and thereby earned her own maintenance and clothing.

The defendant Annie Maria Orr, as contended by the plaintiff, also, from the time she was appointed guardian until the land was sold, received the rents and profits thereof.

On the 1st of May, 1876, William Orr, the husband of the defendant Annie Maria Orr, caused a summons, specially endorsed, to be issued out of the Court of Queen's Bench, at Toronto, against the defendants Edward Lennox and Jeremiah Carty, the executors under the will of the said John Orr, for board, lodging, and clothing, alleged to have been supplied to the plaintiff, the said Eliza Orr, at the request of the defendants, and for money paid by the plaintiff for the use of the defendants at their request; and on the 19th May, 1878, caused a judgment for default of appearance to be entered up against the said executors,

for the sum of \$677.95 damages, and \$26.25, costs, together amounting to \$704.20; and writs of *feri facias*, goods and lands, were issued, directed to the sheriff of the county of York, requiring him to levy the said amount.

William Orr died on the 14th of August, 1876.

Jeremiah Carty died in September, 1868; and by his will appointed Abraham W. Lauder and Walter Sutherland Lee executors, who proved the said will and took out probate thereto.

Under the writ of *feri facias* lands, the sheriff advertised for sale, and on the 30th of October, 1869, offered for sale the lands in question, when the defendant Abraham W. Lauder became the purchaser thereof, at the price or sum of \$750.

The sheriff, on the 3rd December, 1869, by deed poll granted and conveyed all the interest of the defendants Edward Lennox and Jeremiah Carty, as executors as aforesaid in the said lands and premises, to the defendant Abraham W. Lauder.

On 6th April, 1871, John J. Withrow and John Hillock bought the said lands and premises from the defendant Abraham W. Lauder, for the price of \$1,800, paying him \$500 in cash, and giving back a mortgage for the balance of \$1,300, and the said J. J. Withrow and John Hillock immediately thereafter went into possession of said lands and premises.

It appeared that the plaintiff had never been in possession of the lands and premises, and had never received any part of the rents and profits thereof, and no one had ever accounted to her for the same.

The plaintiff at the time of the recovery of the said judgment and sale of the said lands and premises, and for many years subsequent thereto, was a minor under the age of 21 years.

The plaintiff set up fraud and collusion in the obtaining of the said judgment, and of the sale under it to Lauder, and that Withrow and Hillock purchased from him with notice and knowledge of the premises.

The plaintiff contended that the said judgment, the *fiery facias* issued thereupon, and the sale made by virtue thereof of the said lands and premises by the said sheriff of the county of York, was void, both at law and in equity; and that, by reason of the fraud and collusion between the said defendants before mentioned, and of the notice thereof to all the said parties, the said judgment, the writs of execution issued thereupon, and the said sale thereunder, were void, both at law and in equity, and that no title to the said lands and premises passed by the said deed from the said sheriff of the county of York to the said defendant Abraham W. Lauder, nor by the said deed from the said defendant Abraham W. Lauder to the defendants John J. Withrow and John Hillock, or either of them.

The defendants alleged that there were in the hands of the said sheriff at the time of the said alleged sale another execution against the lands of the said testator, recovered during his lifetime by one William Quigley, under which the said lands were validly sold; but the plaintiff contended that even if this were the case the said execution was founded on a judgment recovered on a mortgage made by the said testator to the said Quigley, and the said judgment and execution were for the sum of about \$600, and the said mortgage was of certain land in Toronto owned by the said testator during his life, and now by the plaintiff as his heir-at-law; and the plaintiff contended that if the said sale was valid, the money realized thereby should have been applied to satisfy the said Quigley execution, and only so much of the land in question sold as was sufficient therefor, whereas land to the value of over \$900 was sold, and that sum realized by the sale, but no part of it was paid to the plaintiff or to Quigley.

The cause was heard before Blake, V. C., who delivered the following judgment:

BLAKE, V.C.—I suppose there is no doubt that this present plaintiff would have the right, if there is any ground for impeaching the judgment, to impeach it in this Court, because she is not a party to the judgment at law; although if she were a party to the judgment at law, the only ground

under *Tait v. Harrison*, 17 Gr. 458, under which she could have impeached it, would have been that of fraud, and under that authority, no doubt, if there were fraud in the recovery of the judgment, it would not be necessary for a party to the judgment to go to a Court of law to have the judgment discharged, but by filing a bill here the whole matter would have been investigated, and the judgment discharged in this Court; but here the person was no party to the judgment at law. She would have no right, unless under the Administration of Justice Act, to make the application, and therefore would be compelled to come to this Court for the purpose of having the judgment discharged. Well, the judgment she asks to have discharged is one that was recovered against the estate, which is her property, and the mode by which it has been sold has been by assuming a debt as against her testator, recovering upon that assumed debt a judgment, issuing an execution, and selling the lands. There can be no doubt whatever that there was no debt. There can be no doubt whatever that there was nothing to support that judgment. There can be no doubt whatever that there was no right under that judgment to interfere with this land. And I take the distinction to be this: where a judgment has been recovered, although it has been for a great deal more than is due from the estate to the plaintiff, yet, if there still be any sum that would warrant a sale of the lands, the Court will not, unless there has been collusion, interfere with that judgment, but will allow the property to go to the sheriff's vendee, leaving it to the person whose property has been sold to have recourse against the person who has improperly disposed of it; but I do not think there is any authority for the proposition that where there is no debt at all, where there is no liability, where there is nothing upon which you can found a judgment, and upon that judgment, without anything to base it, the property has been sold—to say that the land of this person, not liable for that debt, not made available by any due process of law, “that that is to be taken without anything upon which the execution can stand, or the judgment can stand.” I think it is impossible to find any authority for such a proposition as that, and that is just exactly the position in which the defendants here are placed. There was no liability on the part of the estate. This was for a matter subsequent to the death of the testator. If such an arrangement as is contended for exists for the support of the daughter, the only claim that could be made would be by the persons who supplied the necessaries for her support; the only way in which this property could have been disposed of would have been by the recovery of such a judgment, and then putting a *f. fa.* in the hands of the sheriff, or, as the better practice would have been, making an application to the Court and asking that, this being necessary for the maintenance of the infant, a certain portion of the estate should be set aside for that purpose.

I think, therefore, that in this case there was no effectual disposition of this land by *f. fa.* in the hands of the sheriff, and that the property should, except for one reason, be disencumbered from this sale: that the sale should be discharged; but I do not think it would be reasonable that that should be the result here until there has been a satisfaction made of

the amount, if anything, that is due by this plaintiff for her support for seven or eight years.

I think, therefore, that there should be a reference to the Master here to ascertain what sum, if any, is due by the plaintiff for her support and maintenance for these seven or eight years, and I make no order as to what is to be done with the property until that is ascertained. If that amounts to \$600, \$700, or \$800, it is obvious that it will be useless proceeding further with the suit. If the finding is that the amount is small, why then it may be worth while having some order made for either the payment of the difference or a re-sale of the premises for the purpose in this Court of satisfying that claim.

There have been charges of fraud made, not merely, as Mr. Boyd has said, of constructive fraud, because what the parties did was something that the Court would not allow, owing to any technical rule, but there have been distinct charges of fraud made that have not been supported, and I do not think that under those circumstances I can give the plaintiff the costs of this litigation. However, I will reserve these until the Master makes his report.

There are authorities very clear, though not direct, that the Court will not encourage charges of fraud or impropriety as are here alleged. There was no collusion, no impropriety, nothing of the kind thus charged in the bill against the defendant, and I do not think it is a case, more particularly where there is a solicitor engaged and charged, that these charges should be largely spread upon the records of the Court.

However, I reserve the question of the disposition of the costs of suit, simply referring it to the Master to ascertain what sum, if anything, is due from the plaintiff to Annie Maria Orr for her support, and reserve further directions and costs; and the parties will see, after the enquiry in the Master's office, whether it is worth while prosecuting this suit any further, and whether there is really anything in it.

The matter accordingly came before the Master, who found that there was nothing due from the plaintiff to the said defendant Annie Maria Orr for such support and maintenance.

The case then came before Blake, V.C., on further directions, when he delivered the following judgment:

BLAKE, V.C.—At the original hearing of this cause, I found it proved that there was no debt due from the estate of John Orr, deceased, to William Orr. This appeared on the face of the judgment roll, which shews a claim for board, lodging, and clothing supplied by the plaintiff to the said Eliza Orr, at the request of the defendants, and for money paid by the plaintiff for the use of the defendants, at their request. This judgment displayed a claim against the defendants on their promise, and not one which could result properly in a judgment against the estate of John Orr.

But in case of the defendants in this suit I added, "she was liable for necessities, and I think she must pay whatever amount is justly due, as a term of getting back the property." For this reason alone I directed the reference, which has resulted in the finding of the Master that there is not anything due from the plaintiff on the claim made. I do not think I should be asked on the hearing on further directions to reconsider this conclusion, nor indeed am I at liberty to do so.

I have, however, referred to the following authorities on the points argued before me: *Gardiner v. Juson*, 2 E. & A. 188; *Doe dem. Boulton v. Fergusson*, 5 U.C.R. 515; *Duchess of Kingston's Case*, 2 Sm. L. Ca. 7th ed., 780 et seq.; *Gold v. Strobe*, Carth. 148; *Doe dem. Hagerman v. Strong*, 4 U. C. R. 510; *Macnamara on Nullities*, 26, 31, 137; *Freeman on Judgments*, sec. 480 et seq.; *Herman on Executions*, secs. 255, 348, 398; *Ransom v. Williams*, 2 Wall. S. C. 313; *Bourne on Judicial Sales*, secs. 880, 890, 898, 923; *Eccles v. Lowry*, 23 Grant 167; *Martin v. Gale*, L. R. 4 Ch. D. 428; *Rowe v. Jarvis*, 13 C. P. 495; *Bank of Montreal v. Munro*, 23 U. C. R. 414, 419; *Mandeville v. Nicholl*, 16 U. C. R. 609; *Tait v. Harrison*, 17 Gr. 458; *Powell v. Graham*, 7 Taunt. 581, *Ashby v. Ashby*, 7 B. & C. 444; *Samis v. Ireland*, 4 App. 118, which do not cause me to alter the conclusion at which I had arrived. The property was not advertised under, nor did the sale purport to be made under the Quigley writ. It had not run the time needed to enable the sale to be made under it, and on this ground I held on the original hearing that this suit could not support the sale.

As the Master finds nothing due under the judgment impeached, it follows from the conclusion arrived at on the hearing of this cause, that the plaintiff is entitled to have this judgment set aside, and the sale thereunder declared void without other terms than that if she demands an account of the rents and profits, Withrow and Hillock are entitled against these to set off their improvements and taxes. The defendants Annie Orr, Withrow and Hillock must pay the plaintiff's costs of the suit. No costs as to the other defendants Withrow, Hillock, and Quigley, or any of the defendants thinking themselves entitled to any relief consequent on this decree, can apply in this suit on petition. At present it is a contest between co-defendants, which, on the pleadings as they stand, cannot be investigated satisfactorily.

By the decree on further directions the defendants Annie Maria Orr, J. J. Withrow and John Hillock were ordered to pay the plaintiff's costs, and save as aforesaid the Court made no further order as to costs.

The defendants J. J. Withrow and John Hillock, appealed to this Court.

The following were the reasons of appeal. The decree, on further directions, pronounced by the Court of Chan-

cery, dated 25th October, 1880, is erroneous, and ought to be reversed or varied.

1. The object sought by the bill of complaint was the setting aside the judgment-at-law, under which the sale of the lands in question was made, upon the ground of irregularity in obtaining the judgment, and the Court of Chancery had no jurisdiction to entertain a bill for such a purpose: *Tait v. Harrison*, 17 Gr. 458. 2. Even if the Court would entertain the bill on the ground of fraud, the learned Vice-Chancellor distinctly negatived fraud. 3. He bases the decree upon the ground of the want of the existence of a debt which could form the foundation for the judgment, but the purchaser at the sheriff's sale was not, nor were the appellants, bound to inquire into the existence of a debt. 4. There was a writ of *fiery facias* valid upon its face, founded upon a judgment valid upon its face, and the sale being made under these, the purchaser and those claiming under him are entitled to rely upon the sale as valid: *Mandeville v. Nicholl*, 16 U. C. R. 609; *Doe dem. Hagerman v. Strong*, 4 U. C. R. 510; *McDade dem. O'Connor v. Dofoe*, 15 U. C. R. 386; *Doe dem. Boulton v. Ferguson*, 5 U. C. R. 515; *Powell v. Graham*, 7 Taunt. 580. 5. Even if the proceedings in the action at law had to be looked at, the claim made by and endorsed upon the writ was such as would support the judgment: *Ashby v. Ashby*, 7 B. & C. 444; *Williams on Executors*, 7th ed., p. 1772. 6. The appellants were purchasers for value, without notice of the alleged right of the respondent Freed, and should have been protected in their purchase: *Totten v. Douglas*, 18 Gr. 341; *Peterkin v. McFarlane*, in Supreme Court. (a) 7. The appellants were entitled to the benefit and protection of the registry laws, and effect should have been given to the said laws in their favour: *Peterkin v. McFarlane*, 4 App. 25. 8. There was another writ of *fiery facias* in the hands of the sheriff at the time of the sale, and this would support the sale. 9. The appellants ought under any circumstances to have been allowed for their

(a) Not yet reported.

improvements, and should have been awarded their costs of this suit at law, mentioned in the pleadings. 10. The appellants, under any circumstances, ought to have been declared entitled to a lien for the amount paid to Mrs. Orr, by Mr. Launder, the purchaser of the lands at the sheriff's sale: *Re Howarth*, L. R. 8 Ch. 415; *Goodfellow v. Rannie*, 20 Gr. 425. 11. The matters in contention in this suit are substantially identical with those embraced in an action in the Court of Common Pleas, in which the appellants were the defendants and the respondent was the plaintiff, as shewn by the evidence, and by the answer of the appellants, and it was also shewn by the evidence that the suit in the Court of Common Pleas was pending and undetermined at the time of the commencement of this suit, and under such circumstances the Court below should not have entertained this suit, or should have dismissed the respondent's bill of complaint. 12. The appellants should not have been ordered to pay the plaintiff's costs of this suit, but at most only a portion of the same.

The following were the reasons against the appeal:

The respondent Eliza Freed submits that the decree pronounced by the Court of Chancery appealed from is right, and should be sustained for the following among other reasons: 1. In view of the circumstances and facts proved, the judgment at law under which the sale of the lands in question took place was illegal and fraudulent, and was properly vacated. 2. The judgment on its face discloses no cause of action for which the lands of the deceased could have been validly sold, and the purchaser, under the execution issued thereon, cannot hold the land against the devisee. 3. In judicial proceedings to effect the sale of the lands of a testator which have been devised by him, it is essential that there be a debt established as against his executors, which was a valid liability of the testator during his life, and that has not been done in the present case. 4. No other writ of execution was shewn to exist under which the sale was made, or, if made, could be supported. 5. Even if it were proved that the appellants had made improvements upon the premises in

question, they did so with knowledge, actual or imputed, of the invalidity of the title. 6. The defence set up by the appellants failed *in toto*, and they were properly ordered to pay the costs of the litigation. 7. The pendency of another suit at law, even if established, for the same subject matter, is only a ground for putting a party plaintiff to his election, with which suit he will proceed, and is not a matter of defence to either suit. 8. It is not competent to prosecute any appeal against the decree on further directions, without also attacking the original decree herein made on the 24th day of October, 1878, and it is now too late to appeal against that decree. 9. If for any reason it should appear that the present decree on further directions against the appellants cannot be supported, this respondent submits that relief should be given to her for the value of the said property as against the defendant Lauder, through whose acts and assistance the said sale was procured, and that in such event the said Lauder should be ordered to pay the costs of litigation. 10. If for any reason it should appear that the said land was validly sold as under the Quigley execution, then this respondent submits that she should get the benefit of the land covered by the Quigley mortgage, which would thereby be fully paid, and should also have an account of the surplus obtained from the sale of the land in question over and above what would satisfy the Quigley execution. 11. In any event this respondent should get relief by an order for payment of the full value of the land sold as against the defendant Annie Maria Orr.

On May 20, 1881, on the appeal coming on for argument, (a) *H. T. Beck*, on behalf of the defendants Lauder and Lee, moved to quash the appeal on the ground that they had not been served with the notice under the provisions of R. S. O. ch. 38, sec. 26: that no sufficient notice under Gen. Ord. 16 had been served on said defendants; and that no security had been given them, nor any draft case served upon them.

(a) *Present*.—SPRAGGE, C. J. O., BURTON, PATTERSON, and MORRISON, JJ. A.

It appeared that the appellants (defendants Withrow and Hillock) had served a notice of appeal, under sec. 26 of the Appeal Act, R. S. O. ch. 38, on the plaintiff only. The plaintiff, however, by the 9th reason against the appeal, claimed relief over against the defendants Lauder and Lee, and thereupon served the defendants Lauder and Lee with the reasons against appeal.

The appeal book was settled without notice to the defendants Lauder and Lee, no security was given to them for the costs of appeal, and when the appeal came on for argument no other papers had been served on them than the reasons against appeal, and the printed appeal book and notice of setting down the appeal.

H. T. Beck, in support of the motion, referred to *Wheeler v. Gibbs*, 3 Sup. Ct. R. 375; *Liverpool Gas Co. v. Everton*, L. R. 6 C. P. 414; *Peacock v. The Queen*, 27 L. J. N. S. C. P. 224; R. S. O. ch. 38, secs. 21, 23, 25, 26, and 30, and Gen. Ord. App. 14 and 16.

Bethune, Q. C., and *Ferguson, Q. C.*, for the appellants, and *E. Blake, Q. C.*, and *W. Cassels* for the respondent (plaintiff), opposed the motion.

On behalf of the plaintiff it was also contended that the Court had no jurisdiction to hear the appeal at all, more than a year having elapsed since the making the decree which was pronounced at the hearing, before the appeal was brought on for argument.

The Court overruled the latter objection, and, after taking time to consider, held that the defendants Lauder and Lee had been properly brought before the Court by being served with the reasons against appeal, and that the service on them of a notice under sec. 26 of the Appeal Act was not necessary.

The case then stood over for argument until May 23, when the appeal was argued. (a)

(a) *Present*.—SPRAGGE, C. J. O. ; BURTON, PATTERSON and MORRISON, JJ. A.

Bethune, Q. C., and *Ferguson*, Q. C., for the appellants.
E. Blake, Q. C., and *W. Cassels* for the respondent *Eliza Freed*.

Robinson, Q. C., and *H. T. Beck* for the respondents *Lee* and *Lauder*.

The arguments and cases cited sufficiently appear from the reasons for and against the appeal.

September 17, 1881. BURTON, J. A.—Much of the argument in the Court below, would appear to be irrelevant to the real question intended to be raised on this appeal—viz: whether the lands of a testator can be validly sold under a judgment against executors, when it is made to appear that the debt recovered in the judgment was not a debt of the testator. It is not a question of impeaching the judgment—that judgment may well be allowed to stand, and cannot affect the plaintiff; but the question is, whether there is any authority under such a judgment to seize and sell the lands which were of the testator at the time of his death.

I should suppose that in an ordinary case of sale under execution, the purchaser would be merely bound to shew the *fi. fu.* in order to entitle him to recover against the original debtor. That writ would be *prima facie* evidence of a judgment: and if good upon the face of it, and warranted by the judgment—that is to say, by that portion of the record, after the "*ideo consideratum est*,"—he would not be affected by any defects appearing on the record anterior to it; for even if the judgment should be reversed for error appearing on the record, yet after the land had been sold under a writ valid on the face of it, the debtor could only be restored to the money made under the execution, and not to the property which had been sold under the command of the Court.

In *Doe dem. Hagerman v. Strong*, 4 U. C. R. 510, where the action was brought against the sheriff's vendee, or rather against a purchaser from the sheriff's vendee, by the heir-at-law of the judgment debtor, and where it was objected

that it appeared upon the face of the judgment roll that the defendant was alleged to have been summoned, whereas that was not the proper process to bring the party into Court, this and all other objections appearing on the face of the record anterior to the entry of the judgment were held to be immaterial as regards a purchaser under the execution, for similar reasons to those I have referred to; and a case in *Dyer*, 363, is relied on.

So here, consistently with the decisions upon the Statute of 5 Geo. II. ch. 7, confirmed by our own Act, 27 Vic. ch. 15, if the judgment had been in respect of a debt of the testator, so that the lands would be assets for its satisfaction, it would not have been in the power of the heirs or devisees to impeach the sale under it for error appearing on its face.

But that is not the question. The statutes make the land liable to be sold only for a debt of the testator or intestate; and whatever may be the effect of the judgment, a sale of the testator's lands under it cannot be upheld, if in point of fact it was not recovered in respect of a debt of the testator.

The section of the original Act, sec. 4 of 5 Geo. II. ch. 7, enacts that lands, negroes, and other hereditaments in the colonies belonging to *any person indebted*, shall be liable to and chargeable with all just debts of what nature or kind soever, and shall be made assets for the satisfaction thereof, in like manner as real estates are by the law of England liable for the satisfaction of debts due by bond or other specialty; and shall be subject to the like remedies, proceedings, and process in any Court of law or equity for seizing and selling, and in like manner as personal estates in the colonies are seized and sold.

The construction placed upon this Act by our Courts having been shewn to be incorrect by the judgment of the Privy Council in *Bullen v. A'Beckett*, 1 Moo. P. C. N. S. 223, our Legislature passed the 27 Vic. ch. 15, the first section of which declares that the title and interest of a testator or intestate in real estate in Ontario, may be seized and sold under a judgment and execution recovered by a creditor of

the testator or intestate against his executors and administrators, in the same manner and under the same process that the same could be sold under a judgment and execution against the deceased if living.

In both cases the statutes make it a pre-requisite to the seizure and sale that the judgment must be recovered by a creditor of the testator. The execution plaintiffs never were creditors of the testator, and the authority therefore to sell the property necessarily fails.

The plaintiff, in this view of the case, would have been entitled to recover in the common law suit, without submitting to any conditions. Why she should have thrown away that advantage and gone into equity is not shewn, but having chosen that forum, she was bound to accept the relief which a Court of Equity would give upon such terms as it might think fair and reasonable to impose. The terms which the learned V. C. appears to have intended to impose seem to me to have been such as it was eminently proper to impose in a case of this nature, where the purchasers were innocent purchasers; and it is alleged that the plaintiff received the benefit of maintenance and education by an expenditure of the defendant Maria Orr, which was repaid to her from the proceeds of this land. Whether that intention has been carried out by the inquiry actually directed appears to me, I must confess, to be very questionable. It was not whether any sums had been properly expended for necessaries for the infant, but was in these words: "That it be referred to the Master at Hamilton to ascertain and state what sum (if any) is due from the plaintiff to the defendant Maria Orr for her support."

The Master has found that there is nothing due; but this may be either on the ground that there was no contract between the plaintiff and Maria Orr, the contract, if any, being between Maria Orr and the executors, or that any claim which at one time existed for moneys expended by Maria Orr for the plaintiff's support has been satisfied by the sale of this land.

The conclusion strikes me as very unsatisfactory; because

it is quite possible that the Master's finding is based upon one or other of these contingencies, and the intention of the Court in making it a condition that the plaintiff should be in a position to deprive the purchasers of their purchase only on payment of what has been properly expended in the plaintiff's maintenance and education may have been defeated.

The decree to my mind is also unsatisfactory in disposing of the costs of the litigation.

The learned Judge, at the hearing, commented upon the charges of fraud and impropriety which had been made against a gentleman who is an officer of the Court, and I agree with him in thinking that they were entirely unsupported. I think it a case wherein it would have been proper, not only to deprive the plaintiff of her costs, but to allow the defendant, thus wrongfully accused, all his costs of the litigation. The matter is not open to us, but I do not think it would be right to dispose of this appeal without expressing an opinion that these charges have been made without the slightest justification or excuse.

The result is, that the judgment is affirmed, with costs.

SPRAGGE, C. J. O., PATTERSON, and MORRISON, JJ. A., concurred.

Appeal dismissed.

A DIGEST
OF
ALL THE REPORTED CASES
DECIDED IN
THE COURT OF APPEAL,

FROM THE 20TH DECEMBER, 1880, TO THE 28TH DECEMBER, 1881.

ACCESSORY.

See EXTRADITION.

ACQUIESCENCE.

See HUSBAND AND WIFE, 2.

ACTION.

Cause of.—*See* CONTRACT.

ADMINISTRATION.

Personal representative—Limitations, Statute of—*R. S. O. ch. 49, sec. 9.*—The plaintiff filed his bill against his two brothers seeking administration of his father's estate, of which he alleged they had possessed themselves on his death in 1848. It appeared that the plaintiff attained his majority in 1857, and it was not

proved that any fraud or concealment had been practised upon him.

Held, that the suit was improperly constituted, as the father's personal representative was not before the Court.

Held, also, that the Court has no power, where the administration of an intestate's estate forms the subject of the suit, to appoint a representative, under sec. 9 of R. S. O. ch. 49, as the intestate is not a party interested in the matters in question in the suit within the meaning of that section.

Held, also, that the plaintiff was barred by the Statute of Limitations, and by the releases executed by him. *Hughes v. Hughes et al.*, 373.

See LAND—PLEADING IN EQUITY.

ADMINISTRATOR AD
LITEM.

See PRACTICE.

ADMISSIONS.

See ESTOPPEL.

AGENT.

Evidence of agency.—See SALE OF GOODS.

See PRINCIPAL AND AGENT.

AGREEMENT.

See CONTRACT.

ALIENATION.

Restraint on.—See WILL, 1.

ALTERATION.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

AMENDMENT.

See NONSUIT—PARTNERSHIP.

ANNUITY.

See WILL, 1.

APPEAL.

1. *New trial—Discretion of Judge—Appeal from.*—Where the County Court Judge granted a new trial owing to his dissatisfaction with the verdict, the Court refused to interfere with his discretion, as it did not appear that he was clearly wrong. *Hunter v. Vanstone*, 337.

2. *Nonsuit—New trial.*—The plaintiff being in possession of land as tenant of H., was evicted by the defendant, who claimed under an overdue mortgage. A nonsuit was entered at the trial, on the ground that the defendant was at law entitled to possession, evidence of equitable right to possession in the plaintiff having been refused. The Court of Queen's Bench in its discretion granted a new trial. On appeal to the Court of Appeal:

Held, that the Court could not interfere. *Robinson v. Hall*, 534.

3. *Garnishee proceedings—County Court.*—*Held*, that there is no appeal from an order made in garnishee proceedings in a County Court under sec. 313, appeals from County Courts being expressly limited to the cases mentioned in section 35 of the County Courts Act. Section 200 of the C. L. P. Act, does not give a general appeal from the County Courts, being controlled by the sub-heading preceding section 189. *Sato et al v. Hubbard*, 546.

4. *Bringing non-appealing parties before Court—Months notice of appeal—Limitation of time to appeal.*—Two only of several defendants appealed. The respondent by her reasons against the appeal claimed relief over against two of the other defendants to the suit, and served them with the reasons against appeal, and subsequently with the printed appeal book, and with notice of setting down the appeal for argument. These defendants had never been served with the statutory month's notice of appeal, nor furnished with security for the costs of the appeal, nor afforded an opportunity of taking part in the settlement of the appeal book.

Held, that they were properly before the Court.

Where a decree was made at the hearing of a case, but certain questions were reserved for further directions: *Held*, that the year within which an appeal could be brought ran from the making of the decree on further directions, and not from that on the hearing. *Freed v. Orr et al.*, 690.

New trial.]—See **WAYS**.

See **NONSUIT — PARTNERSHIP — PRACTICE — TRUSTS AND TRUSTEES, 2 — WATER AND WATERCOURSES.**

ASSIGNMENT.

For creditors.]—See **BANKRUPTCY AND INSOLVENCY, 6.**

ATTACHMENT OF DEBTS.

See **APPEAL 3.**

ATTORNEY.

See **COSTS — PRINCIPAL AND AGENT, 1 — TRUSTS AND TRUSTEES, 1.**

ATTORNEY-GENERAL.

See **BRIDGE — ESCHEAT.**

ATTORNMMENT.

See **LANDLORD AND TENANT, 4.**

BANKRUPTCY AND INSOLVENCY.

1. *Insolvent Act of 1875—Sale of security—Right to prove.*]—Under the Insolvent Act of 1875, a creditor holding security at the time of the insolvency, cannot realize the security, and prove on the estate for the balance.

Re Hurst, 31 U. C. R. 116, commented upon. *Re Beaty, an Insolvent*, 40.

2. *Insolvent Act of 1875, sec. 63 Privileged claim.*]—*Held*, reversing the judgment of the Queen's Bench, 45 U. C. R. 188, that privileged claims are not within the class of debts mentioned in the 63rd section of the Insolvent Act of 1875, to which a discharge does to apply without the consent of the creditor. *Fryer v. Shields et al.*, 57.

3. *Insolvent Act of 1875—Sale of debts over \$100*]—*Held*, affirming the judgment of the County Court, that under section 67 of the Insolvent Act of 1875, all debts exceeding \$100, must be sold separately, unless where there is a sale of the whole estate *en bloc*; and the purchaser of such a debt, otherwise than the section directs, cannot recover against the debt. *Fisken v. O'Neill*, 99.

4. *Insolvent Act of 1875—Assumption of liabilities by continuing partner—Joint and separate debts.*]—Where, upon the dissolution of a firm, the business is continued by one of the partners, who assumes the liabilities, the joint assets remaining in specie are primarily applicable to the payment of the joint creditors of the firm.

Held, that under section 88 of the

Insolvent Act of 1875, if the dividend is derived wholly out of joint estate, the joint creditors alone can share until fully paid; if wholly out of separate estate, it belongs entirely to separate creditors till they are paid, and if partly out of each class of assets, it should be divided *pro rata* between each class of debts. *Re Walker, an Insolvent*, 169.

5. *Insolvent Act 1875, sec. 134—Payment within thirty days to bank of discounted note.*—The defendants discounted at a bank a promissory note which A. had given them, and on maturity it was paid to the bank out of A.'s moneys within thirty days of his insolvency.

In an action by the assignee to recover the amount from the defendants as being a payment within sec. 134 of the Insolvent Act of 1875:

Held, reversing the decision of the County Court, that they were not liable, as the payment was not made to them, but to the bank, who were the actual creditors. *Miller v. Harvey*. 203.

6. *Assignment for creditors—Revocable deed—Preference—R. S. O. ch. 118, sec. 2—Surprise.*—B., an insolvent debtor, made a deed of his stock-in-trade and lands to the plaintiff in trust, to convert the same into money, pay the expenses of the trust retain ten per cent. of moneys received by way of compensation, and pay the present execution and other privileged creditors if any, according to priority, next to divide the balance *pari passu* amongst all other creditors, and to pay the surplus, if any, to B. The plaintiff took possession under the deed. The trustee was not a creditor, and there was no evidence of any acceptance of the deed by, or communication of it, to any of the

creditors. The defendants seized under an execution a few days after the deed.

Held, affirming the judgment of the County Judge of Halton, that the deed was a revocable, voluntary instrument, the relation of trustee and *cestuis que trust* not having been established between the plaintiff and the creditors, and therefore void as against the defendants.

Held, also, that it was void under R. S. O. ch. 118, sec. 2, as it did not provide for the paying ratably and proportionately, and without preference or priority all the creditors, but gave a preference to others besides execution creditors.

Held, also, that the abstaining of a party from proof under the idea that the opposite party has no real intention of putting him to such proof, and being thereby taken by surprise, is not ground for granting a new trial. *Andrew v. Stuart et al.*, 495.

7. *Insolvent Act, 1864, sec. 8, sub-sec. 7—Insolvent Act 1875, sec. 136—Fraud in obtaining credit—Contract made abroad—Jurisdiction of Dominion parliament.*—The plaintiffs sued for goods sold and delivered to defendants who were insolvents, and under sec. 136 of the Insolvent Act of 1875, charged the defendants with fraud in procuring the goods on credit, knowing themselves to be unable to meet their engagements, and concealing the fact from the plaintiffs, thereby becoming their creditors with intent to defraud them. The defendants were domiciled in Ontario, and the contract was made in England.

Held, affirming the judgment of the Court of Common Pleas, reported in 31 C. P. 112, that the act charged was not a crime, nor the charge of

fraud a criminal proceeding, but merely a proceeding at the instance of a private person to enforce payment of a debt; and it made no difference therefore that the contract out of which the cause of action arose, was made in England.

Per SPRAGGE, C. J. O., and MORRISON, J. A.—Sec. 136, dealing with matter of procedure incident to the law of bankruptcy and insolvency, was within the jurisdiction of the Parliament of Canada to enact.

Per BURTON, J. A.—Sec. 136, which gives certain creditors an additional remedy in the Provincial Courts for the recovery of their debts in full, is *ultra vires* of the Parliament of Canada; but sec. 8, sub-sec. 7 of the Insolvent Act of 1864, to the same effect, is still in force, the Parliament of Canada having no power to repeal it.

Per PATTERSON, J. A.—It is immaterial whether sec. 136 is *ultra vires* or not; for if the Parliament of Canada had the power to deal with the subject of that section, it would be binding, but if not, then the same enactment in sec. 8, sub-sec. 7, of the Act of 1864, is unrepealed and in force. *Peek et al. v. Shields et al.*, 639.

8. *Insolvent Act of 1875, secs. 130, 132, 133—Fraudulent preference.*—The plaintiffs, who were sub-contractors for the stone and brick work of a public school, and who were to receive payment from the principal contractors, who alone were recognized by the public school-board, procured an assignment to themselves of the balance due them by the contractors for their completed work, and payable to the contractors by the board. The contractors were at the time unable to pay their debts,

which the plaintiffs knew, and an attachment in insolvency issued against them within three months after the assignment of the claim.

Held, affirming the judgment of PROUDFOOT, V. C., that the transaction was an unjust preference under sec. 133 of the Insolvent Act of 1875; and, *Semble*, that it was also within the meaning of secs. 130 and 132, and the plaintiffs could not maintain a suit to enforce payment of the balance assigned to them. *Griffiths et al. v. Perry, Assignee*, 672.

BANKS.

See BANKRUPTCY AND INSOLVENCY, 5—ESTOPPEL.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

Promissory note—Material alteration.—After a promissory note, made by three persons, in these words: "We, either three of us, promise to pay D. P. or bearer," had been transferred to the plaintiff's testator, the payee's name was added to the foot of the note, apparently as maker. It did not appear how it came there, but it was not his signature.

Held, affirming the judgment of the County Court, MORRISON, J. A., dissenting, that it was such a material alteration as to vitiate the note; and that this would have been so even if the name had been placed there by the payee or by his authority.

Held, also, that *prima facie* the name was placed there improperly;

that it would have lain upon the testator, if alive, to account for the alteration, and his death did not dispense with this requirement.

Per MORRISON, J.A. — As the name of the payee was forged, it was ineffectual to alter the character of the note, and therefore, did not vitiate it; and in the absence of evidence to shew how the name was added, the presumption would be that, if genuine, it was placed there as an endorsement. *Reid v. Humphrey et al.*, 403.

See BANKRUPTCY AND INSOLVENCY, 5—ESTOPPEL—GIFT—HUSBAND AND WIFE, 1—PARTNERSHIP—PRINCIPAL AND SURETY.

BILLS OF SALE AND CHATTEL MORTGAGES.

See MORTGAGE.

BONUS.

See MUNICIPAL CORPORATIONS—RAILWAYS.

BRIDGE.

Injunction — Bridge company—Specific performance of Acts of Parliament—Attorney-General of Ontario—Locus standi.—The defendants were a company incorporated by the Dominion Parliament for the construction of a bridge from Canada to the United States, across the Niagara River, which was to be as well for the passage of persons on foot, and in

carriages, and otherwise, as for the passage of railway trains. The company completed the bridge for railway purposes only. The time limited by the charter for the completion of the work having elapsed, an information was filed seeking to restrain the use of the bridge by a railway company to which the bridge had been leased, until put into condition for ordinary traffic, or for the removal of the bridge as a nuisance, and to compel permission of its use by foot passengers on payment of the statutory tolls. The bridge owing, it is said, to engineering difficulties, could not be adapted to the use of carriages and foot passengers.

Held, reversing the judgment of SPRAGGE, C., reported in 28 Grant 65, that the abandonment of that portion of the work relating to foot passengers and carriages was not a public nuisance: and the Act of incorporation was not a contract with the public, but merely gave conditional powers creating correlative duties, and was permissive; and that specific performance thereof would not be enforced.

Held, also, that the Attorney-General for Ontario, as representing only a limited portion of the public with whom, if at all, such contract existed, had no *locus standi*.

The work being one within the jurisdiction of the Parliament of Canada, that Parliament, presumably with the knowledge of the state of the bridge, allowed debentures to be issued upon it.

Held, upon this ground also the Attorney-General of Ontario was not the proper party to file the information.

Held, also, that as the bridge extended beyond the limits of the Province, part only being therein, it would

be unavailing for the Court to give the public the right to pass over that part of the bridge only which was within its jurisdiction; and for this reason also, the Court would not interfere. *Attorney-General v. International Bridge Co.*, 537.

BY-LAW.

See RAILWAYS—WAY, 2.

CARRIAGES.

See BRIDGE.

CANADA.

Parliament of.]—*See* BANKRUPTCY AND INSOLVENCY, 7—BRIDGE—RAILWAYS.

CAUSE OF ACTION.

See CONTRACT.

CHARTER.

See BRIDGE—RAILWAYS.

CHATTEL MORTGAGE.

See MORTGAGE.

CHEQUE.

See ESTOPPEL—PRINCIPAL AND AGENT, 2.

CLOUD.

On title.]—*See* SPECIFIC PERFORMANCE.

COMPANY.

Injunction—Bridge—Specific performance of Acts of Parliament—Attorney-General—Locus standi.]—*See* BRIDGE.

Manufacturing—Power to loan to.]—*See* MUNICIPAL CORPORATIONS.

COMPENSATION.

See TRUSTS AND TRUSTEES, 2.

CONCEALMENT.

See ADMINISTRATION.

CONDITION.

Devise on.]—*See* WILL.

CONDITION PRECEDENT.

See MASTER AND SERVANT, 1.

CONSTITUTIONAL LAW.

See BANKRUPTCY AND INSOLVENCY, 7—ESCHEAT—RAILWAYS.

CONTRACT.

Contract—Breach—Cause of action—C. L. P. Act, sec. 49.—The plaintiff, at Kingston, Ontario, having on the 20th October, ascertained from the defendant, in reply to his enquiry, the price for forging a cross-head for an engine, wrote on the same day to the defendant at Montreal, Quebec, enclosing a drawing, and asking him to ship the cross-head to him at Kingston, as soon as finished, *per G. T. R.* In answer defendant wrote that the matter would have immediate attention, "and as soon as ready I will ship to your address." The cross-head was subsequently shipped to plaintiff at Kingston as directed, when a defect in the forging was discovered, and after being used on the plaintiff's steamer for some months it broke at the defective point. On a motion to set aside the service of the writ herein the plaintiff undertook to prove at the trial a cause of action which arose in Ontario, or in respect of a contract made therein, within the R. S. O. ch. 50, sec. 49.

Held, reversing the decision of the Common Pleas, 31 C. P. 164, that the contract being to forge and deliver on the Grand Trunk Railway at Montreal, was a contract made in the Province of Quebec, and the defect in the beam, being the breach of the warranty that it should be reasonably fit for the purpose for which it was made, existed when it left the workshop at Montreal, the breach also occurred in that Province, and the plaintiff therefore must be nonsuited. *Gildersleeve v. McDougall*, 553.

Made abroad.—*See* BANKRUPTCY AND INSOLVENCY, 7.

Joint.—*See* HUSBAND AND WIFE, 1.

See BRIDGE—LANDLORD AND TENANT, 1.—MASTER AND SERVANT—PENALTY BY CONTRACT—PRINCIPAL AND SURETY—SPECIFIC PERFORMANCE—SURVEY.

CONTRIBUTORY NEGLIGENCE.

See SURVEY.

CORPORATIONS.

See MUNICIPAL CORPORATIONS.

CORROBORATION.

See COUNTY COURTS—GIFT.

COSTS.

Fraud.—Fraud having been charged against a defendant, who was a solicitor, and the charge being wholly unsupported: *Semble*, that it would have been proper not merely to deprive the plaintiff of her costs, but to allow such defendant all his costs. *Freed v. Orr et al.*, 690.

See WATER AND WATER-COURSES.

COUNTY COURTS.

Liquidated demand—Jurisdiction—Evidence—Construction.—Action for the price of thirty hogsheads of goods. It appeared that K. sold to S., the defendants' testator, a quantity of goods, which K., in his evidence, said was a definite quantity which he could not recollect, but not less than thirty hogsheads and not more than forty, at the price of \$10 per hogshead.

Held, that the demand was liquidated by the act of the parties at the time of sale, and the action was therefore within the jurisdiction of the County Court

K. had assigned the moneys due to him by S.: *Held*, that K., who was a witness, was not "an opposite or interested party to the suit," within the meaning of the Evidence Act, R. S. O. ch. 62, sec. 10, and his evidence therefore did not require corroboration as against the executors of S.

Per PATTERSON, J. A.—That it was not improper to leave to the jury the question whether the amount was ascertained by the act of the parties. *Watson v. Severn et al.*, 559.

Garnishee proceedings.—*See* APPEAL, 3.

Amendment on appeal from.—*See* PARTNERSHIP.

Jurisdiction.—*See* LANDLORD AND TENANT, 4.

COURT.

Discretion of.—*See* APPEAL, 2.

See COUNTY COURTS.

COURT OF CHANCERY.

See DOWER—ESCHEAT.

COVENANT.

Action on.—*See* LANDLORD AND TENANT, 2.

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CREDITORS.

Assignment for.—*See* BANKRUPTCY AND INSOLVENCY, 6.

CRIMINAL LAW.

See BANKRUPTCY AND INSOLVENCY, 7—EXTRADITION.

CROPS.

Option to pay for.—*See* LANDLORD AND TENANT, 3.

DAMAGES.

Liquidated or penalty.—*See* PENALTY BY CONTRACT—*See* SURVEY.

DEBENTURES.

Rate of interest on.—*See* MUNICIPAL CORPORATIONS—RAILWAYS.

See BRIDGE.

DEBTS.

Sale of.—*See* BANKRUPTCY AND INSOLVENCY, 3.

Joint and separate.—*See* BANKRUPTCY AND INSOLVENCY, 4.

DECREE.

Vacation as against one of several defendants—Effect of.—*See* PRACTICE.

See APPEAL, 4.

DEDICATION.

See WAYS, 2.

DEED.

Of assignment—Revocable—Voluntary.—*See* BANKRUPTCY AND INSOLVENCY, 6.

DEFENDANT.

Vacation of decree against one of several defendants.—*See* PRACTICE.

DEMURRER.

See SPECIFIC PERFORMANCE.

DEPOSITIONS.

See EXTRADITION.

DEVISE.

See WILL.

DISCHARGE OF MORTGAGE.

See ESTATE TAIL.

DISCRETION.

Court—Judge.—*See* APPEAL, 1
—INSURANCE, 3.

DISMISSAL.

See MASTER AND SERVANT, 1.

DISTRESS.

See MORTGAGE.

DITCHES.

See WAYS, 1.

DOMINION PARLIAMENT.

Procedure in insolvency.—*See* BANKRUPTCY AND INSOLVENCY, 7.

Power to grant charter to railway within Province.—*See* RAILWAYS.

Bridge company—Specific performance of acts of parliament.—*See* BRIDGE.

DONATIO MORTIS CAUSA.

See GIFT.

DOWER.

42 Vic. ch. 22, O.]—*Held*, that the statute 42 Vic. ch. 22, O., "An Act to amend the law of Dower," does not apply to mortgages made before it was passed. *Martindale v. Clarkson*, 1.

EARNINGS.

See HUSBAND AND WIFE, 2.

ELECTION.

See LANDLORD AND TENANT, 3.

EQUITY.

See PLEADING IN EQUITY.

ESCHEAT.

Escheat—Attorney-General—Court of Chancery—Jurisdiction.—*Held*, affirming the judgment of *PROUDROOT, V. C.*, 26 Gr. 126, that the doctrine of escheats applies to Ontario: that the Attorney-General for Ontario is the proper person to represent the Crown and to appropriate the escheat to the uses of the Province: that the Court of Chancery has jurisdiction in such a case; and that it was proper for the Attorney-General to file a bill in the Court of Chancery to enforce the escheat. *Attorney-General of Ontario v. O'Reilly*, 576.

ESTATE.

Separate.—*See* HUSBAND AND WIFE.

ESTATE TAIL.

Mortgage of.—Although under *R. S. O. ch. 100, sec. 9*, a mortgage in fee simple by a tenant in tail vests the fee simple in the mortgagee, the registration of a discharge of such mortgage, in accordance with *R. S. O. ch. 111, sec. 67*, does not reconvey the estate to the tenant in tail barred of the entail; it operates only as a reconveyance of the original estate of the mortgagor. *Lawlor v. Lawlor et al.*, 312.

ESTOPPEL.

Cheque—Forged endorsement of—Payment by bank—Liability to drawer—Negligence.—The plaintiff's valuator, one H. filled in the blanks

in an application for a loan on statements of one S. who forged the names of J. T. B. and I. B. as applicants, and although H. had never seen the property or the applicants, he certified a valuation to the plaintiffs, who accepted the loan, and signed his name as witness to the signatures of the applicants. Cheques in payment thereof to the order of the supposed borrowers were obtained by S., who forged the name of the payees, endorsed his own name, and received payment of the cheques, which were drawn upon the defendants, through other banks, who presented them to the defendants and received payment in good faith. The fraud was not discovered for some time, during which the cheques were returned to the plaintiffs at the end of the month as paid, and the usual acknowledgment of the correctness of the account was duly signed.

Held, affirming the judgment of the Queen's Bench, 45 U. C. R. 214, that the plaintiffs were not estopped from recovering the amount paid on the forged endorsements from the defendants by their agent's negligence, as it did not occur in the transaction itself, and was not the proximate cause of their loss.

Held, also, that the acknowledgment of the plaintiffs of the correctness of the account at the end of the month, was at most an acknowledgment of the balance on the assumption that the cheques had been paid to the proper parties.

Held, also that it could not be said that the cheques were made payable to fictitious payees, and were therefore payable to bearer. *Agricultural Savings and Loan Association v. Federal Bank*, 192.

See LANDLORD AND TENANT, 4.

EVIDENCE.

Corroboratory.]—See COUNTY COURTS.

See EXTRADITION — GIFT — HUSBAND AND WIFE, 2—LANDLORD AND TENANT, 2 — NONSUIT — SALE OF GOODS—SURVEY—WAYS, 1.

EXECUTION.

Stay of, under Appeal Act.]—See WATER AND WATERCOURSES.

Sale of land under—Validity of.]—See LAND.

EXECUTORS AND ADMINISTRATORS.

See ADMINISTRATION.

EXPERTS.

See SURVEY.

EXTRADITION.

Sufficiency of evidence—Depositions—Copies of—Indictment—Accessory before and after the fact.]—The judgment of the Court of C. P. 31 C. P. 484, affirmed, but on different grounds.

An accessory before the fact is liable to extradition, but an accessory after the fact is not.

Upon the application to the County Judge of Kent for extradition of the defendant, who was under indictment in the State of New York for murder, the coroner, who had held the inquest there, proved by oral testimony before the County Judge

here, the original depositions taken on oath before him, and also copies of the depositions certified by him to be true copies.

Held, that under section 14 of the Imperial Extradition Act of 1870, the original depositions were properly received, as the power given therein to use the original depositions is not qualified by sec. 2 of 31 Vic. ch. 94 D.; and that the evidence disclosed therein was sufficient to warrant the extradition of the prisoner as an accessory before the fact.

Held, also, that the foreign indictment was not admissible as evidence against the accused.

It was shewn that the only warrant issued in this case was the warrant issued by the district attorney, after the grand jury had found a true bill for murder, which did not profess to be issued upon the depositions, nor was it proved upon what evidence the bill was found.

Semble, per PATTERSON, J. A., that the right given by sec. 14 above referred to, to use copies of depositions is confined by the effect of sec. 2 of 31 Vic. ch. 94, to those cases in which a warrant has been issued in the United States upon the depositions. *Regina v. Browne*, 386.

FENCES.

See WAYS, 1.

FIRE INSURANCE

See INSURANCE.

FIXTURES.

Mortgage of freehold—Unattached machinery.]—Mortgagors of vacant

land, adjacent to their foundry, which was constructed of stone, erected thereon a frame building as a lean-to to the foundry, and placed in it three lathes, an iron planer, two drills, a crane and a shaper, all of which, with the exception of one drill, which was bolted to the frame work, the latter being bolted to the girders, were kept in their position by their own weight, without being fastened to any part of the building, and were capable of being removed without injury to either building or machinery. When the mortgage was given the land was not worth the money advanced, but the mortgagees relied on a substantial building which the mortgagors intended to erect on it as an extension to their factory, and took a covenant to insure the building for \$4,000, but they did not bind the mortgagors to build or to put in machinery.

Held, reversing the decree of SPRAGUE, C., that the machines were not fixtures, as they were not put in the building with the intention that they should become part of the realty.

Held, also, that the mere fact that such machines are brought upon the land by the owner of the freehold raises no presumption that he intends to make them part of the realty.

Per PATTERSON, J.A., the weight of authority is against construing as fixtures anything which is not annexed in fact to the realty, except where the articles form part of the fabric, as an integral portion of the architectural design, or as in the case of a mill stone, which is an essential part of the mill.

McDonald v. Weeks, 8 Gr. 297, dissented from. *Keefer v. Merrill*, 121.

FORECLOSURE.

See TRUSTS AND TRUSTEES, 1.

FOREIGN INDICTMENT.

Admissibility of.—*See* EXTRADITION.

FORGERY.

See BILLS OF EXCHANGE AND PROMISSORY NOTES—ESTOPPEL.

FRAUD.

In obtaining credit.—*See* BANKRUPTCY AND INSOLVENCY, 7.

Unsupported charges of against solicitor.—*See* COSTS.

See ADMINISTRATION—MORTGAGE.—PRINCIPAL AND AGENT, 2—TRUSTS AND TRUSTEES, 1.

FRAUDULENT PREFERENCE.

See BANKRUPTCY AND INSOLVENCY, 7.

FRAUDS, STATUTE OF

See LANDLORD AND TENANT, 1—MASTER AND SERVANT, 2—SALE OF GOODS.

FREIGHT.

See INSURANCE, 5.

GARNISHMENT.

See APPEAL, 3.

GIFT.

Promissory note—Gift inter vivos—Corroboration.]—The plaintiff had performed services for one P. in his lifetime, and he, intending to make some recognition thereof told her that a certain promissory note payable to himself or bearer, which he produced, was hers, saying, "Here is your note; take it when you want it." The plaintiff told him to keep it for her, as she had no place in which to keep it herself, and he did so.

Held, affirming the judgment of the County Court, that this constituted a complete gift *inter vivos*, there being a gift, and an acceptance of it by the donee, and actual delivery not being necessary as in the case of a *donatio mortis causa*.

Held, also, that the plaintiff's evidence was, upon the facts stated below, sufficiently corroborated. *Watson v. Bradshaw et al.*, 666.

See MUNICIPAL CORPORATIONS.

GOODS, SALE OF.

See SALE OF GOODS.

GUARANTEE STOCK.

See INSURANCE, 2.

HIGHWAYS.

See WAYS.

HIRING.

Contract of.]—See MASTER AND SERVANT.

HUSBAND AND WIFE.

1. *Married woman—Separate estate.*]—*Held* (reversing the judgment of the County Court of York), that the rents derived by a *feme covert*, married before 1859, from real estate acquired by her in 1865, were her separate estate.

Quære, Per BURTON, J. A., whether a married woman can be liable on a joint contract.

Per BURTON, J. A.—Where an action is brought against the two makers of a joint and several note, if it fail against one it must fail as to both. *Horner v. Kerr et al.*, 30.

2. *Married woman—Separate estate—Acquiescence of husband—Wife's earnings—C. S. U. C. c. 73*]—The plaintiff, a widow, had, during her coverture, lent the defendant a sum of money which she had earned when living apart from her husband, who had never made any claim to this money, or to any of her earnings.

Held, affirming the judgment of the County Court, that the plaintiff was entitled to recover, as the evidence shewed that the husband had acquiesced in her treating her earnings as her separate property; and that C. S. U. C. c. 73, which was in force when the money was lent, in no way abridged the power of the husband to make such a settlement by his acts or acquiescence as well as by a formal writing or distinct words. *Carroll v. Fitzgerald*, 93.

Title in wife]—See NUISANCE.

IMPROVEMENTS.

See WATER AND WATERCOURSES.

INDICTMENT.

See EXTRADITION.

INFORMATION.

See BRIDGE.

INJUNCTION.

Interlocutory.—See NUISANCE.

See BRIDGE.

INSURANCE.

1. *Further insurance—Mistake.*]

—The plaintiff, who was insured in the defendants' company under a policy containing a condition that the "Company is not liable * * * if any subsequent insurance is effected in any other company, unless and until the company assent thereto by writing, signed by a duly authorized agent," effected an insurance with the Mercantile Insurance Company, which was void at their option on account of a similar condition, the policy with the defendant not having expired as a matter of fact, though the plaintiff was led by the agent of the other company to believe it had.

Held, affirming the judgment of the Queen's Bench, 44 U. C. R. 490, that the plaintiff could not recover, for the insurance in the Mercantile Company, being not void, but only voidable, was a subsequent insurance within the meaning of the condition. *Gauthier v. Waterloo Mutual Ins. Co.*, 231.

2. *Mutual Ins. Co. — Separate branches—Liability of branches to contribute to repay guarantee stock—* 36 Vic. ch. 44, O.]—The defendants,

a mutual insurance company in existence at the time of the passing of the Mutual Companies' Act of 1873, 36 Vic. ch. 44, O.,) had divided their business into several branches, and had also raised a guarantee capital fund, out of which the losses in all the branches as they arose were paid. The by-law for raising the guarantee fund, passed on the 12th January, 1874, contained a provision that from the surplus profits of the company from year to year, and by assessment on premium notes, a reserve fund should be created for the purpose of paying off the guarantee capital.

In a suit by a creditor to realize the assets of the company, it appeared that the amounts to be collected on the premium notes in two branches, would not suffice to pay the losses in those branches, and that the amounts to be collected on such notes in the other two branches were sufficient for that purpose.

Held, by PROUDFOOT, V. C., on appeal from the Master, that the policy-holders in the solvent branches were liable to be assessed on their premium notes for the purpose of paying off the liability due to the guarantee stockholders so far as might be necessary to discharge losses paid in those particular branches from the guarantee fund.

Held, on appeal to this Court, that whatever might be the power of the directors, the Court of Chancery had no jurisdiction to make the assessment.

Quære, per BURTON, J. A., as to the effect of sec. 75 of R. S. O. ch. 161, and its inconsistency with the clauses of the Act relative to branches and the exemption of members of one branch from liability for claims on another. *Duff v. Canadian Mutual Ins. Co.*, 238.

3. *Fire insurance—Loss—Proof within thirty days—R. S. O. ch. 162.*—The judgment of the Court of Common Pleas, 31 C. P. 562, affirmed, BURTON, J., dissenting.

Sec. 2 of R. S. O. ch. 162, relieving the insured under certain circumstances from forfeiture for non-delivery of the proofs of claim, applies to Mutual Insurance Companies, and to the time of delivery as well as to insufficiency in the proofs.

Held, also, BURTON, J., dissenting, under the facts set out in this case the omission to deliver the proofs in proper time, arose from accident or mistake, within the meaning of that clause.

Remarks as to the construction and effect of this clause, and the extent of the discretion given by it to the Court or Judge. *Robins v. Victoria Mutual Ins. Co.*, 427.

4. *Mutual insurance—Proprietary or mutual policy—Further insurance.*—The defendants were authorized by their charter to carry on both proprietary and mutual insurance business; but they were debarred from taking risks which were extra-hazardous in the mutual branch. The plaintiffs' property falling within the prohibited class, was insured with the defendants by a policy which was not on its face a mutual one, but an absolute undertaking to pay the loss, but instead of making a cash payment they gave a premium note upon which they paid several assessments. The application also was headed "Premium Note System."

Held, reversing the judgment of the Court of Chancery, 28 Gr. 525, that the policy was not a mutual one, there being nothing except the premium note, which was not conclusive,

to indicate that it was a mutual insurance, and the property being of such a nature that it could not be insured in the mutual branch.

Quære, per CAMERON, J., whether the risk was sufficiently shewn to be one which defendants could not insure in their mutual branch.

Held, also, following *Parsons v. Standard Ins. Co.*, 5 Sup. Ct. R. 233, that a change in the company in which another insurance has been effected, not increasing the amount insured, did not avoid the policy. *Lowson et al v. Canada Farmers' Mutual Fire Ins. Co.*, 512.

5. *Insurance—Freight—Loss*—The plaintiffs were insurers of a cargo of grain, and the defendants insurers of both hull and freight of the vessel, which was owned by M. The vessel sank during the voyage and damaged the grain. Both the owner and the plaintiffs thought it more prudent to take the cargo to Buffalo, as being more saleable there than in Kingston, its original destination. M. however refused to deliver it to the plaintiffs until his freight was paid in full, and the plaintiffs thereupon paid it, and took an assignment of his policy on the freight, on which they now sued the defendants. It was found as a fact at the trial that the cargo might have been taken to its destination in specie, and the freight earned.

Held, affirming the decision of the Common Pleas, 30 C. P. 57, that the plaintiffs were not entitled to recover; for their only rights were those of M., who had suffered no loss for which the defendants were liable, inasmuch as the freight had not only not been lost by the perils insured against, but had not been lost at all, he having received it

in full. *Anchor Marine Ins. Co. v. Phoenix Ins. Co.*, 567.

See PLEADING IN EQUITY.

INTEREST.

Rate of, on debentures.]—See MUNICIPAL CORPORATIONS.

See MORTGAGE.

JOINT CONTRACT.

See HUSBAND AND WIFE, 1.

JUDGE.

Discretion of—New trial.]—See APPEAL, 1—TRUSTS AND TRUSTEES, 2.

JURISDICTION.

Dominion Parliament.]—See BRIDGE—BANKRUPTCY AND INSOLVENCY, 7.

County Courts.]—See COUNTY COURTS—LANDLORD AND TENANT, 4.

See CONTRACT—ESCHEAT.

JURY.

Question for.]—See COUNTY COURTS—WAYS, 1.

LAND.

Land of testator—Liability to sale under execution.]—The land of a testator or intestate is liable to be sold only for his debt, and where it is shewn that the judgment was not in fact recovered in respect of such a

debt, but that the execution creditors never were creditors of the deceased, a sale of such land under it cannot be supported. *Freed v. Orr et al.*, 690.

Unpatented.]—See LIMITATIONS, STATUTE OF.

See FIXTURES.

LANDLORD AND TENANT.

1. *Statute of Frauds—Memorandum—Sufficiency of—Contract to procure lease.*]—The defendant agreed to pay the plaintiff \$300 if he would procure a lease of the premises then occupied by him under lease from one W., and adjoining the defendant's, with the privilege of making a doorway between the two houses, and assign the lease to him. At the plaintiff's request, the defendant wrote him the following letter :

"To Mr. JOHN BLAND.

"Dear Sir,—In reply to yours of to-day, I promise to give you \$300 provided you can give me a transfer lease, with privilege to make an opening between your premises and my own. Cash to be paid on completion of transfer lease. This is as I understand it."

"Yours most truly,
"T. EATON."

The plaintiff procured a lease, and tendered an assignment of it to the defendant, who refused to accept it, whereupon the plaintiff sued for he \$300.

Held, reversing the decision of the County Court, that the defendant's letter was a sufficient memorandum to satisfy the requirements of the 4th section of the Statute of Frauds, within which the agreement fell as

being a contract concerning an interest in land; that the premises were described with sufficient certainty, and the omission to specify the terms of the lease was immaterial, they having been left in the plaintiff's discretion. The plaintiff, therefore, was held entitled to recover. *Bland v. Eaton*, 73.

2. *Lease—Non-execution by one lessee—Action on covenant.*—The two defendants and one C., being in possession of premises as assignees of a covenant from the plaintiff for a lease, he caused a lease to the three to be drawn, which was executed by the defendants, on the representation that C. had executed a counterpart thereof, which was not the case, and the lease was never executed by him.

Held, affirming the judgment of the Common Pleas, that the evidence set out in the case, shewed that the intention of both the plaintiff and the defendants was, that C. should be a party to the lease, and that the plaintiff could not recover the rent due in an action upon the covenant in the lease. *Piper v. Simpson et al.*, 175.

3. *Lease—Proviso for determination—Option to pay for crops—Construction.*—By a lease from one D. to the plaintiff it was provided that if D. sold the farm the plaintiff should give up possession upon receiving six months' notice before the 1st of April, and that he should have the privilege of harvesting and threshing the crops of the summer fallow, or the work done on said fallow should be paid for at a reasonable valuation. D. afterwards sold to the defendant, and in August the plaintiff received the stipulated notice after he had prepared the summer fallow but before he had sown

it. He afterwards sowed it with fall wheat, and gave up possession on the 1st of April. Neither D. nor the defendant elected to pay for the crop, and the defendant converted it to his own use.

Held, affirming the judgment of the Queen's Bench, 44 U. C. R. 509, that the true construction of the provision was, that the plaintiff was to have the privilege of harvesting any crops which might have been put in on the summer fallow, unless D. elected to pay for them at a valuation; that he had never parted with the property in the crop, and that he was therefore entitled to recover in trover against the defendant.

Per PATTERSON, J. A.—If the lessor intended to pay for the work, he was bound to elect to do so when he gave the notice, or at the latest, when he resumed possession. *Harrison v. Pinkney*, 225.

4. *Attornment—Title.*—S., being indebted to the plaintiffs, entered into an agreement to mortgage to them, amongst other lands, certain lands known as the Dominion Hotel property. A mortgage was on the same day executed, but by mistake the Dominion Hotel property was omitted therefrom, and a lot formerly owned by S. adjacent thereto inserted. The defendant had been the tenant of S., and after the mortgage, attorned and paid some rent to the plaintiffs, believing them to have a title to the lands. In an action for arrears of rent:

Held, affirming the judgment of the County Court of York, that, after such attornment and payment of rent, the defendant could not be heard to deny the plaintiff's title, and they being the equitable owners of the land, were entitled to recover.

Held, also that the title not being open to question by the defendant, the County Court had jurisdiction. *Bank of Montreal v. Gilchrist*, 659.

See MORTGAGE.

LANE.

See WAYS, 2.

LEASE.

See LANDLORD AND TENANT.

LEGACY.

See WILL.

LIMITATION.

Of time to appeal.]—*See* APPEAL, 4.

LIMITATIONS, STATUTE OF.

Unpatented lands — Mortgage — Sale under power — Patent — Statute of Limitations.]—C., being the locatee of the Crown, in 1860, mortgaged the north-half and the south-half of the land by two mortgages to McM. In 1865 he died. In 1870 and 1874, McM. assigned the mortgages respectively to D. In 1875 the patent of the north-half issued to one Campbell, who paid the purchase money due to the Crown on the whole lot, at the request M. and A., the widow and son of C., and the patents of the east and west halves of the south-half, issued to M. and A. respectively, without any intention (as shewn by the memorandum in

the Crown Lands Department) to cut out the right, if any, of D. under his mortgage. In 1876, D., under the power in his mortgages, sold to L., who, in 1876, made a mortgage to the plaintiff, on which this suit was brought. M. and A. had, in the meantime, always occupied the land without paying principal or interest, and they claimed title by possession.

Held, affirming the judgment of the Court of Chancery, reported in 27 Grant 253, that M. and A. had, under the Statute of Limitations, acquired a title by possession. *Watson v. Lindsay et al*, 609.

See ADMINISTRATION.

LIQUIDATED DAMAGES.

Penalty]—*See* PENALTY BY CONTRACT.

LIQUIDATED DEMAND.

See COUNTY COURTS.

LOAN.

To manufacturing company — Power.]—*See* MUNICIPAL CORPORATIONS.

See SPECIFIC PERFORMANCE.

MACHINERY.

See FIXTURES.

MANDAMUS.

See RAILWAYS.

MANUFACTURES.

See MUNICIPAL CORPORATIONS.

MARRIED WOMAN.

See HUSBAND AND WIFE.

MARINE INSURANCE.

See INSURANCE, 5.

MASTER AND SERVANT.

1. *Contract of hiring*—"Practical tanner"—*Dismissal*—*Condition precedent*.]—The plaintiff agreed with the defendant to serve him as manager of a tannery for six years, the agreement reciting that he was to manage the works, while the defendant was to furnish the capital. He also agreed to disclose to the defendant a secret process of tanning, which defendant was not to use after the agreement, except in connection with plaintiff, and to manufacture the leather according to such process.

The defendant discharged the plaintiff after about seven months, alleging, amongst other things, that he was not a practical tanner, and that he was not using the secret process, and had not disclosed it to the defendant.

Held, reversing the judgment of PROUDFOOT, V. C., 27 Gr. 86, that the plaintiff was a practical tanner within the meaning of the agreement; and the manufacture of leather was being carried on according to the secret process, and that as no time was limited for disclosing such process, the defendant, who had never asked for the disclosure, had no right

to dismiss the plaintiff for its non-disclosure.

A reference was therefore directed as to the damages sustained by the failure of the defendant to perform his part of the agreement, and for the dismissal. *Blake v. Kirkpatrick*, 212.

2. *Contract not to be performed within a year*—*Statute of frauds*—*Defeasible contract*.]—*Held*, reversing the judgment of the County Court of York, that a contract of hiring for a year or more defeasible within the year, is within the fourth section of the Statute of Frauds.

The agreement, as alleged by the plaintiff, was made in February, 1880, whereby the defendant was to pay him for his services while he should remain in defendant's employment, at the rate of \$500 a year, for one year, and thereafter at such salary as might be agreed upon; the plaintiff to enter upon his duties, and his salary to commence on the 3rd of March, then next, and defendant was to be at liberty to determine the employment at the expiration of a month named, otherwise the agreement to remain in full force for a year, and for such longer period as might be agreed upon.

Held, clearly within the statute. *Booth v. Prittie*, 680.

MEMORANDA.

56, 263.

MISDIRECTION.

See COUNTY COURTS.

MISTAKE.

See INSURANCE, 1.

MONTH.

Notice of appeal.]—See APPEAL, 4.

MORTGAGE.

Distress clause—Tenancy at will.]

—The distress clause in the Short Forms of Mortgages Act is merely a license to take the goods of the mortgagor; the intention being to provide in a concise referential manner for the disposal of the goods when seized in the same manner as goods seized for rent.

A mortgage made in pursuance of this Act, contained the following: "and the mortgagor doth release to the company all his claims upon the said lands, and doth attorn to and become tenant at will to the mortgagees, subject to the said proviso." It also provided that the mortgagees on default of payment for two months, might on one month's notice, enter on and lease or sell the lands; that they might distrain for arrears of interest, and that until default of payment, the mortgagors should have quiet possession.

Held, OSLER, J., dissenting, reversing the judgment of the Queen's Bench, 45 U. C. R. 176, that though the relation of landlord and tenant may have been thereby created, yet there was no rent fixed for which there was power to distrain, and the plaintiff therefore could not claim a landlord's right as against an execution creditor, of a year's arrears of interest on their mortgage before removal by the sheriff.

The relation of landlord and tenant may be created by proper words between mortgagee and mortgagor for the *bona fide* purpose of further securing the debt without being

either a fraud upon creditors, or an evasion of the Chattel Mortgage Act. *Trust and Loan Company v. Lawrason et al.*, 286.

See DOWER—ESTATE TAIL—FIXTURES—LANDLORD AND TENANT, 4—LIMITATIONS, STATUTE OF—MUNICIPAL CORPORATIONS—PRINCIPAL AND AGENT, 2—SPECIFIC PERFORMANCE—TRUSTS AND TRUSTEES, 1—WILL, 1.

MUNICIPAL CORPORATIONS.

Loan to manufacturing company—Power to loan—Debentures—Rate of interest on.]—*Held*, affirming the judgment of Proudfoot, V.C., that a municipality, under 36 Vic. ch. 48, sec. 372, sub-sec. 5, O., has power to lend money for the encouragement of a manufacturing establishment, notwithstanding the use of the word "bonus" therein, which does not necessarily import a gift; and they are therefore liable on debentures issued for the purpose of raising money to be so lent.

The rate of interest on the debentures was seven per cent.

Held, that sec. 217 of 29 & 30 Vic. ch. 51, has not been repealed, though marked *effete* in the schedule prefixed to, and not re-enacted in, 36 Vic. ch. 48, O., and that the above rate was therefore lawful.

Quære, whether the power to give would not include power to lend.

If there had been no power to lend, and the mortgage taken by the municipality to secure repayment of the money lent was invalid. *Quære*, whether this would afford any defence to the debentures; and *Quære* also, whether the municipality having received the consideration stipu-

lated for, the debenture holders might not have some remedy against the municipality, thought not by direct suit on the debentures. *Scottish American Investment Co. v. Corporation of Elora*, 628.

See BRIDGE—RAILWAYS—WAYS.

MUTUAL INSURANCE.

See INSURANCE.

NEGLIGENCE.

See ESTOPPEL—SURVEY.

NEW TRIAL.

Discretion.—See APPEAL, 1, 2.

Surprise.—See BANKRUPTCY AND INSOLVENCY, 6.

See WAYS.

NONSUIT.

Ground not taken at trial.—The verdict herein was set aside by the County Court, and a nonsuit entered upon a ground not taken as a defence at the trial or in the rule *nisi*.

Held, reversing the judgment that the learned Judge erred in giving effect to the objection, which, if taken at the trial, would have been met by an amendment.

As the evidence shewed that the plaintiff was entitled to succeed upon the merits, the appeal was allowed, and the rule in the Court below discharged. *Clarke et al. v. Barron*, 309.

See APPEAL, 2—WAYS.

NOTICE.

Of appeal.—See APPEAL, 4.

Of non-payment.—See PRINCIPAL AND SURETY.

NOTICE TO PRODUCE.

See SALE OF GOODS.

NUISANCE.

Interlocutory injunction—Title to property in wife—Adding parties.—

The defendant was engaged in making boilers and gas receivers, in the manufacture of which it was necessary to join together pieces of iron about an inch thick by riveting, which produced noises, continuing from seven in the morning until six o'clock at night, rendering the occupation of the house of the plaintiff's wife, which was only fifteen feet distant, and in which they lived, almost impossible and seriously interfered with her health. Upon a bill filed by the plaintiff, Proudfoot, V. C., granted an interlocutory injunction restraining the defendant from continuing the boiler-making in such a manner as to be a nuisance to the plaintiff and his premises.

Held, reversing this decree, that the wife was the proper person to file the bill, for as injury to property is the ground of jurisdiction in cases of nuisance, the owner of the property is the proper party to complain.

Quere, whether the husband had any title in the land, and whether his occupancy with his wife was more than permissive on her part.

An application made by counsel to add the wife as a party, in order to meet the difficulty, authority having been given by her, was refused on

the ground that the suit was not merely, not properly constituted, but that the husband having no *locus standi*, the suit had no proper existence at all, and another person who had the right could not be substituted for one who had not the right to institute the proceedings.

Held, also, that if the suit had been properly constituted, the Court would not have interfered with the discretion of Proodfoot, V. C., in granting the interlocutory injunction. *Hathaway v. Doig*, 264.

See BRIDGE.

PARLIAMENT.

Dominion — Jurisdiction.] — See BANKRUPTCY AND INSOLVENCY, 7.

See BRIDGE.

PARTIES.

Adding.] — See NUISANCE — APPEAL, 4.

See ADMINISTRATION.

PARTNERSHIP.

Authority of one partner to sign notes — County Court — Amendment on appeal from.] — The plaintiff, knowing that the defendants were a firm of solicitors, advanced to one A. money upon a joint note signed by him and by one of the defendants in the firm's name, without the knowledge or consent of his partner. No usage or general mutual authority to sign notes in the name of the firm was proved, and it was admitted that the plaintiff had no knowledge of the transactions relied upon to shew such authority. A verdict was given for defendants in the County Court, and a rule *nisi* to set it aside refused.

Held, that the plaintiff could not recover against both defendants, but that the defendant who signed the note was liable; and the Court, having no power on an appeal from the County Court to amend the record, allowed the appeal on payment of costs by the appellant, so far as to direct the issue of a rule *nisi*, upon the return of which in the Court below, the necessary amendment could be made.

Semble, per BURTON, J. A., that even in the case of a trading partnership, a partner has no implied power to give the partnership name to secure the debt of a third person. *Wilson v. Brown et al*, 411.

Assumption of liabilities by continuing partner — Joint and separate debts.] — See BANKRUPTCY AND INSOLVENCY, 4.

PATENT.

See LIMITATIONS, STATUTE OF.

PAYMENT.

Within thirty days to bank of discounted note.] — See BANKRUPTCY AND INSOLVENCY, 5.

See ESTOPPEL — PRINCIPAL AND SURETY.

PENALTY BY CONTRACT.

Agreement — Liquidated damages or penalty.] — The defendant, who had trespassed on the plaintiff's land by placing stones and commencing to build a stone fence thereon, entered into an agreement to remove the same before the 15th of December, unless, upon a re-survey, which

he had the privilege of having made before the 15th November, it was found that the line run by one S., a surveyor, was not the correct line, or unless defendant should fail to have such re-survey; and he agreed "to pay to the plaintiff the sum of \$200 as liquidated damages if the said stones and stone fence are not removed, as hereinbefore agreed, at the times mentioned in this agreement."

Held, affirming the judgment of the County Court, that the sum mentioned was not a penalty, but liquidated damages for the omission to perform a specific act, viz., the removal of the stones and stone fence.—*Craig v. Dillon*, 116.

PERSONAL REPRESENTATIVE.

See ADMINISTRATION.

PLAN.

Registered.—*See* WAYS.

Omission to file.—*See* RAILWAYS.

PLEADING IN EQUITY.

Prayer for general relief—Effect of—Relief not specifically prayed for.—If the allegations in a bill state a case entitling a party to relief, he may under the general prayer have it, though his specific prayer may have been for other relief; but a plaintiff cannot take advantage of the ambiguity of his own pleading so as to claim upon facts stated in the bill *alio intuitu*, a relief entirely foreign to the scope of the bill.

The bill, which was filed against the executors of C. S., his widow and children, prayed that the proceeds of an insurance policy which had been effected by the deceased for his wife and children should be subjected in the hands of the executors, to the payment of moneys lent by the plaintiff to the deceased, and applied by him to the support of his children, and that the executors might be restrained from paying over the money.

BLAKE, V. C., overruled a demurrer thereto, and under the prayer for general relief granted administration.

Held, reversing this decision, that under the circumstances the plaintiff was not entitled to the administration decree. *Gaughan v. Sharpe*, 417.

See SPECIFIC PERFORMANCE.

POSSESSION.

See LIMITATIONS, STATUTE OF.

POWERS.

Sale under.—*See* LIMITATIONS, STATUTE OF.

PRACTICE.

Decree—Vacation of, as against one of several defendants—Effect of.—A decree which had been made against several defendants, one of them A., being administrator *ad litem* of a defendant who had died before answer, was vacated as to the defendant B., and leave given him to file a supplemental answer and have a new hearing of the cause. Subsequently C., who had, since the decree and before the appeal, been

appointed administrator in place of A. who died after decree, applied for leave to file an answer setting up defences which his predecessor had omitted. It was shewn that he had been appointed *pro forma* to represent the estate; that no proceedings in appeal had been served upon him, and that no further relief was sought against the estate. The Referee granted the leave asked.

Held, affirming the order of Proudfoot, V. C., that the vacation of the decree against B. did not, under the circumstances, open up the decree as against the deceased defendant's estate, and that the Referee had, therefore, no power to allow C. to file a supplemental answer. *Peterkin v. McFarlane et al.*, 254.

See CONTRACT — NUISANCE — WAYS, 1.

PREFERENCE.

See BANKRUPTCY AND INSOLVENCY, 6, 7, 8.

PRESUMPTION.

See LANDLORD AND TENANT, 2.

PRINCIPAL AND AGENT.

1. *Sub-agent—Privity of contract.* — W. & Co., attorneys in the province of Quebec, for B. & Co., there, requested the defendant, an attorney in the Province of Ontario, to sue a company there on a promissory note made by them, of which B. & Co. were the holders. Defendant issued the writ in the name of B. & Co., and endorsed his own name as attorney. He, however, never had any

communication with them, treating only with W. & Co., who had sent him many similar claims to collect, and crediting them with the amount of the note when collected.

Held, affirming the judgment of the County Court, that the plaintiff, who was the assignee of B. & Co., was entitled to recover from defendant the amount so collected: the rule that the town agent of a country principal is not accountable to a client of the latter not being applicable, as W. & Co. were merely the agents of B. & Co. to retain the defendant to act as their attorney, between whom and W. & Co. a direct privity of contract therefore existed. *Ross v. Fitch*, 7.

2. *Fraud.* — The plaintiff, who applied to the defendants, through one W., their agent, for a loan, requested them by his application to send the money "by cheque, addressed to W." In accordance with their custom to make their cheques payable to their agent and the borrower to insure the receipt of the money by the latter, they sent W. a cheque, payable to the order of himself and the plaintiff. W. obtained the plaintiff's endorsement to the cheque, drew the money, and absconded. The plaintiff swore that he did not know that the paper he signed was a cheque, and there was no evidence to shew that he had dealt with W. in any other character than as the defendants' agent, through whose hands he expected to receive the money.

Held — affirming the decree of PROUDFOOT, V. C., restraining proceedings on the mortgage which the plaintiff had given to the defendants as security for the loan, and directing a reconveyance—that it was W.'s

duty to endorse the cheque to the plaintiff or to see that he received the money, and that the defendants, who had put it in his power to commit the fraud, must bear the loss occasioned thereby. *Finn v. Dominion Savings and Investment Society*, 20.

See SALE OF GOODS.

PRINCIPAL AND SURETY.

Promissory note — Principal and surety inter se—Notice of non-payment.]—The defendants made a joint and several promissory note with one H., as sureties for him, payable to the plaintiff.

Held, affirming the judgment of the County Court, that in default of payment at maturity their liability to pay became absolute; and that it was no defence for them, that the plaintiff neglected to present the note for payment, or give notice of non-payment by H., of which they were ignorant, and that believing the note had been paid by H., they took no steps to recover from him, although he was able to pay, and before they became aware of such non-payment H. had become insolvent.—*Wilson v. Brown et al.*, 87.

PRIVATE RIGHTS.

See WATER AND WATERCOURSES.

PRIVILEGED CLAIM.

See BANKRUPTCY AND INSOLVENCY, 2.

PROMISSORY NOTES.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.

PROOFS OF LOSS.

See INSURANCE.

PROVINCE.

Railway within—Power of Dominion Parliament to charter railway within.]—See RAILWAYS.

See BRIDGE.

PROVINCIAL LAND SURVEYORS.

See SURVEY.

PROVINCIAL LEGISLATION.

See RAILWAYS.

RAILWAYS.

R. W. Co. within Province—Power of Dominion Parliament to grant charter—Bonus—Mandamus.]—By 18 Vic. ch. 33, the Grand Junction R. W. Co., which was to run from the town of Peterborough to Toronto, was, with certain other companies, incorporated with the Grand Trunk R. W. Co. Not having been built within the stipulated time the charter of the former company expired, and in May, 1870, the Grand Trunk Railway having refused to construct it, an Act was passed by the Dominion Parliament, 33 Vic. ch. 53. dissociating the work from the Grand Trunk R. W. Co., and reviving the

charter of the Grand Junction R. W. Co. It directed that all the corporate powers originally vested in that company should be vested in certain persons, who should exercise the same as fully as the parties named in the original charter could have done, and extended the time for construction. On the 23rd of November of the same year, the ratepayers of the defendant municipality voted in favour of granting the company a bonus of \$75,000, but the by-law was never read a third time. At the time the municipality had no power to grant a bonus to a railway company, but subsequently, in 1871, by 34 Vic. ch. 48, O., the by-law was declared as valid as if it had been read a third time. It was to be binding on the corporation, and they were directed to act upon it and issue debentures, as if it had been proposed after the Act. On the same day the municipal law was amended so as to empower all municipalities to grant aid for similar purposes. 37 Vic. ch. 43, O. was then passed amending and consolidating the Acts relating to the plaintiff's railway, but it did not expressly give retrospective validity to anything that had been done, or mention the by-law, and by 39 Vic. ch. 71, O., the time for completion was further extended, and it was directed that none of the by-laws should lapse by reason of non-completion within the time previously fixed.

Held, reversing the judgment of the Q. B., 45 U. C. R. 302, that the Grand Junction R. W. Co., being a local work of the Province of Ontario, the Act 33 Vic. ch. 53, was *ultra vires* of the Dominion Parliament, and that the company were therefore not in existence when the defendants granted the bonus, or when the Act 34 Vic. ch. 48, valid-

ating the by-law was passed; and as 37 Vic. ch. 43, O., which was the first Act by a Legislature having power to incorporate them, did not legalize the by-law in favour of the plaintiffs, they were not entitled to a mandamus to compel the delivery of the debentures.

Held, also, that the railway being wholly within the Province of Ontario, the Dominion Parliament had no power, under the B. N. A. Act, to incorporate the company without expressly declaring the work to be one for the general advantage of Canada or of two or more of the provinces.

Per PATTERSON, J. A., the omission of the plaintiffs to file any plan in accordance with sec. 10, ss. 4 of the Railway Clauses Act, 14 & 15 Vic. ch. 51, was a sufficient answer to the application.

It was provided by the by-law that in the event of trustees being thereafter appointed by the Legislature for receiving the debentures, the Warden should, within six months after the passing of the Act, deliver the debentures to them. No special Act was passed nominating the trustees, but by the Act of 1871, 34 Vic. ch. 48, O., it was enacted that whenever any municipality should grant a bonus to the company, the debentures might, at the option of the municipality, be delivered to three trustees to be named as therein directed.

Per PATTERSON, J. A., the Legislature had not appointed trustees within the meaning of the by-law, and there was therefore no default in delivering the debentures, the mandamus must on this ground also be refused. *Re Grand Junction R. W. Co. County of Peterborough*, 339.

See BRIDGE.

DIGEST OF CASES.

REGISTRATION.

Of discharge of mortgage—Effect of.—See ESTATE TAIL.

See WAYS 2.—WILLS, 1.

RELEASE.

See ADMINISTRATION.

RELIEF.

Prayer for general effect of.—See PLEADING IN EQUITY.

See PRACTICE.

RENT.

See LANDLORD AND TENANT.

REPAIR.

See WAYS, 1.

RIVERS AND STREAMS.

See WATER AND WATERCOURSES.

ROAD ALLOWANCE.

See SURVEY.

SALE OF GOODS.

Statute of Frauds, sec. 17—Agency—Evidence of.—In an action for the non-delivery of certain groceries sold: *Held*, that upon the evidence set out below, K., by whom the sale was made, was shewn to be the

defendant's agent authorized to sell on their behalf.

K. entered the sale in a book which was not produced, but the plaintiff produced a list of the things ordered, and their prices; and K. afterwards sent the order in a letter signed by him to the defendants, who thereupon wrote the plaintiffs, "K. reports a sale that we cannot approve in full, but will accept for," enumerating certain articles. Upon the plaintiffs' insisting on the completion of the order in full the defendants cancelled it altogether.

Held, that the letters were a sufficient memorandum within the 17th section of the Statute of Frauds.

Held also, the letter from K. to the defendants might be assumed upon the evidence set out, to state that he had made a sale of the goods to the plaintiffs at the prices named in the list; and that as such letter was not produced at the trial, though called for by the notice to produce, the Court might, if necessary, presume that it stated anything further which might be necessary for the plaintiffs' case.

Held, also that the effect of the letter from the defendants to the plaintiffs was not impaired by the disapproval expressed therein of part of the order. *Ockley et al. v. Mas-son et al.*, 108.

SALE OF LAND.

See LAND—LANDLORD AND TENANT, 1—LIMITATIONS, STATUTE OF.

SECURITY.

Sale of—Right to prove.—See BANKRUPTCY AND INSOLVENCY, 1.

SEPARATE ESTATE.

See HUSBAND AND WIFE.

SERVANT.

See MASTER AND SERVANT.

SETTLEMENT.

See HUSBAND AND WIFE, 2.

SOLICITORS.

Fraud]—*See* COSTS.

Firm of—Authority to sign notes.]
—*See* PARTNERSHIP.

Town agents.]—*See* PRINCIPAL
AND AGENT, 1.

SPECIFIC PERFORMANCE.

Agreement to lend money—Specific performance—Cloud on title—Demurrer.]—A bill alleged that a mortgage was executed by W. to the defendant, in consideration of \$450: that the defendant advanced only \$150 thereon, and W., being entitled to receive the balance, assigned such right and conveyed his equity of redemption to the plaintiff: that the defendant refused to pay the balance, and claimed to hold the mortgage as security for \$450. The prayer was for specific performance, or, in the alternative, a declaration of the above facts, and for general relief. At the hearing the learned Judge allowed a demurrer *ore tenus*, on the ground that an agreement to lend money could not be specifically performed.

Held, reversing this judgment, that upon the facts alleged in the bill, namely, that the mortgage was being held for more than had been advanced thereon and therefore, to to that extent, formed a cloud on the title, the plaintiff would be entitled to a declaration to that effect, and appropriate relief; and as the demurrer admitted the truth of the allegation, it should have been overruled, *Calvert v. Burnham*, 620.

See BRIDGE.

STATUTE OF FRAUDS.

See LANDLORD AND TENANT, 1—
MASTER AND SERVANT, 2—SALE OF
GOODS.

STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

STATUTES.

14 & 15 Vic. ch. 51, sec. 10, sub-sec. 4.]
—*See* RAILWAYS.

18 Vic. ch. 33.]—*See* RAILWAYS.

C. S. U. C. ch. 48, sec. 15.]—*See*
WATER AND WATERCOURSES.

C. S. U. C. ch. 73.]—*See* HUSBAND AND
WIFE, 2.

Insolvent Act, 1864, 27 & 28 Vic. ch.
17, sec. 8, sub-sec. 7.]—*See* BANKRUPTCY
AND INSOLVENCY, 7.

29 & 30 Vic. ch. 51, sec. 217.]—*See*
MUNICIPAL CORPORATIONS.

31 Vic. ch. 94, sec. 2, D.]—*See* EXTRA-
DITION.

Imperial Extradition Act, 32 & 33 Vic.
ch. 52, sec. 14.]—*See* EXTRADITION.

33 Vic. ch. 53, D.]—*See* RAILWAYS.

34 Vic. ch. 48, O.]—*See* RAILWAYS.

36 Vic. ch. 44, O.]—See INSURANCE, 2.

36 Vic. ch. 48, sec. 372, sub-sec. 5, O.]
—See MUNICIPAL CORPORATIONS.

37 Vic. ch. 43, O.]—See RAILWAYS.

Insolvent Act, 1875, 38 Vic. ch. 16,
secs. 63, 67, 88, 130, 132, 133, 134, 136,
D.]—See BANKRUPTCY AND INSOLVENCY.

R. S. O. ch. 49, sec. 9.]—See ADMINIS-
TRATION.

R. S. O. ch. 43, secs. 35.]—See
APPEAL, 3.

C. L. P. Act, R. S. O. ch. 50, secs. 49, 189,
200, 313.]—See APPEAL, 3.—CONTRACT.

R. S. O. ch. 62 sec. 10.]—See COUNTY
COURTS.

R. S. O. ch. 100, sec. 9.]—See ESTATE
TAIL.

R. S. O. ch. 111, sec. 67.]—See ESTATE
TAIL.

R. S. O. ch. 118, sec. 2.]—See BANK-
RUPTCY AND INSOLVENCY, 6.

R. S. O. ch. 161, sec. 75.]—See INSUR-
ANCE, 2.

R. S. O. ch. 162, sec. 2.]—See INSUR-
ANCE, 3.

39 Vic. ch. 71, O.]—See RAILWAYS.

42 Vic. ch. 22, O.]—See DOWER.

STATUTES, CONSTRUCTION OF.

Survey.]—Remarks as to improp-
riety of receiving the opinions of
surveyors as experts as to the pro-
per mode of making a survey under
the statute *Corporation of Stafford*
v. Bell, 273.

STOCK.

Guarantee.]—See INSURANCE, 2.

STREAMS

See WATER AND WATERCOURSES.

SURETY.

See PRINCIPAL AND SURETY.

SURPRISE.

New trial.]—See BANKRUPTCY
AND INSOLVENCY, 6.

SURVEY.

*Provincial Land Surveyor—Impro-
per survey—Liability for damages.*]—
A surveyor in making a survey is
under no statutory obligation to per-
form the duty, but undertakes it as
a matter of contract, and is liable
only for damages caused by want of
reasonable skill, or by gross negli-
gence.

The defendant, a provincial land
surveyor, who was employed by the
plaintiffs to run certain lines for road
allowances, proceeded upon a wrong
principle in making the survey, and
the plaintiffs sued him for damages
which they had paid to persons en-
croached upon by opening the road
according to his survey.

Held, reversing the judgment of
the Common Pleas, 31 C. P. 77, that
the plaintiffs could not recover, as
although the survey was made by the
defendant on an erroneous principle,
the evidence failed to prove that the
lines as run by him were not correct.

Quære, per PATTERSON, J. A.,
whether the fact that the plaintiffs
knew that the correctness of the sur-
vey was questioned before the open-
ing the road, did not make them
guilty of contributory negligence.

Remarks upon the impropriety of
receiving the opinions of surveyors
as experts, as to the proper mode of
making a survey under a statute.
Corporation of Stafford v. Bell, 273.

TENANT.

See LANDLORD AND TENANT.

TENANT AT WILL.

See MORTGAGE.

TIMBER.

Floating.] — See WATER AND WATER-COURSES.

TITLE.

Property in wife.]—See NUISANCE
Cloud on.]—See SPECIFIC PERFORMANCE.

To land — County Court.]—See LANDLORD AND TENANT, 4.

TRESPASS.

See APPEAL, 2.

TRIAL.

Objection not taken at.]—See NON-SUIT.

TRUSTS AND TRUSTEES.

1 *Foreclosure—Fiduciary relations between mortgagor and mortgagee.*]—In a foreclosure suit the defendant alleged that the plaintiff, a solicitor, had been employed by him in April, 1878, to procure a loan of \$1,400, which he required to pay off a mortgage for \$2,000, on which there was due \$2,120, and that taking advantage of the information so acquired, the plaintiff had purchased the mortgage for himself at the price of

\$1,400. It appeared that the defendant had, in the spring of 1877, obtained a loan of \$600 on a portion of the land in question, through the plaintiff acting as agent and legal adviser of a Loan Company: that in January following, the defendant had applied to the plaintiff, acting in the same capacity, to procure a small loan from the company on the land in question, which the plaintiff told him he could not recommend to the company: that afterwards one B., who held the \$2,000 mortgage, tried to sell it to the company through the plaintiff, who, finding that the land comprised in it did not come up to the value required by the company, wrote B. to that effect, and subsequently the plaintiff, who denied that the defendant had ever requested him to obtain the \$1,400 loan, purchased the mortgage for himself for \$1,625.

Held, reversing the decree of BLAKE, V. C., 27 Gr. 429, that the evidence which is fully set out in the case, shewed that the defendant had not applied to the plaintiff for the \$1,400 loan, and that there was no confidential or fiduciary relationship existing between the parties which precluded the plaintiff from purchasing the mortgage. *Kilbourn v. Arnold*, 158.

2. *Trustee — Compensation—Discretion of Judge.*]—What is proper compensation to be allowed to a trustee for his management of the trust estate is a matter of opinion, and even if, in granting the allowance, the Court below may have erred on the side of the liberality, that alone is not sufficient ground for reversing the judgment.

Where the Master at Guelph had allowed \$125, which the Court, on appeal, increased to \$250, this Court

refused to interfere. *McDonald et al. v. Davidson*, 320.

See BANKRUPTCY AND INSOLVENCY,
6—RAILWAYS.

ULTRA VIRES.

See BANKRUPTCY AND INSOLVENCY,
7—RAILWAYS.

UNPATENTED LANDS.

See LIMITATIONS, STATUTE OF.

WARRANT.

See EXTRADITION.

WATER AND WATER-COURSES.

Streams—Public highways—Floating timber—Improvements—Private rights—C. S. U. C. ch. 48, sec. 15—Costs—Appeal Act—Stay of execution under.—The plaintiff a lumberman, was the owner in fee simple of several parcels of land and large tracts of timber. A stream, on parts of the bed of which he had the fee simple, ran through his lands, which, in its natural state, had not the capacity for floating timber at any time of the year. The plaintiff, and those through whom he claimed spent large sums of money in making improvements upon the stream and in deepening it, and thereby making it floatable. The defendants, who owned the timber limits in the neighbourhood, claimed the right to float their timber down the stream.

Held, reversing the judgment of PROUDFOOT, V. C., BURTON, J. A., dissenting, that the stream was a

public waterway by virtue of C. S. U. C. ch. 48, sec. 15, which by its terms, applies to all streams, whether of natural capacity to permit timber to be floated down them or not; and that the defendant had the right to float timber down the same stream during the spring, summer, and autumn freshets, without compensation to the plaintiff. The appeal was allowed without costs, as the improvements had been made and the bill filed, relying on the authority of *Boale v. Dickson*, 13 C. P. 337, which was properly followed by the learned V. C., but was overruled by this Court.

Per BURTON, J. A.—By the common law those streams only which are sufficiently large to float boats or transport property are highways by water, and not small streams which are not susceptible for use as a common passage for the public. The statute was not intended to confer any new right, but to remove all doubt as to the right of lumberers to use all streams capable, in their natural state, of transporting timber, even although only in times of freshets. *McLaren v. Caldwell*, 456.

WAYS.

1. *Ditches—Necessity to fence, a question for the jury.*—In driving along a county road the plaintiffs were injured by their horse and buggy falling into a ditch at the side of the road. It was shewn that the roadway between the ditches was thirty feet wide: that the ditch was of the same character as those along other roads in the county: and that in some places where the ditches are deeper than usual there are guards. There was evidence produced on the part of plaintiffs which, if believed,

established facts from which a jury might draw the inference that the ditch constructed where and as it was was dangerous, although there was evidence on the part of the defendants to the contrary.

The jury found a verdict for the plaintiffs, but the Court of Common Pleas afterwards, upon a rule nisi to enter a nonsuit or for a new trial, granted a nonsuit, holding that the having made a ditch without guards or railings, or without slanting the roadway to the bottom of the ditch so that a person could drive into it without upsetting, was no evidence of neglect on the defendants' part to keep the road in repair.

Held, reversing this judgment, 30 C. P. 217, that it was a question of fact for the jury, whether, having regard to all the circumstances, the road was in a state reasonably safe and fit for ordinary travel.

As the Court below had pronounced no opinion as to whether there should be a new trial or not, the appeal was simply allowed, setting aside the nonsuit, but leaving the question of new trial untouched. *Walton et ux. v. Corporation of York*, 181.

2. Dedication—Lanes—Registered plan.—In 1856, the owner of lot five registered a plan shewing a subdivision of it into six lots with a lane running through the centre, which was intended for the use of the occupants of the lots adjoining it. He afterwards sold some of the lots, but they were all re-conveyed to him. The lots were always fenced in as one property till 1876, when he sold all the lots and the lane to the bank, by whom a building was erected, the fences remaining as they had been until removed when the building was

in progress, and being afterwards replaced by a new closed fence.

In 1880, at the instance of one M., the owner of the adjoining lot four, who had recently, at his own expense, laid out a lane across his lot in continuation of the lane in lot five, and conveyed it to the corporation, a by-law was passed by the council opening the lane on lot five. It was shewn that M. was the only person interested in having the lane opened.

OSLER, J., quashed the by-law on the ground that it had not been passed in the interest of the public, but simply to subserve the interests of an individual.

Held, dismissing the appeal, that the registration of a plan of a subdivision of a town lot and sales made in accordance with it, does not constitute a dedication of the lands thereon to the public, and the council had therefore exceeded their powers in passing the by-laws in question.

Held, also, that the by-law, being passed in the interest of a particular individual, was properly quashed. *Re Morton and Corporation of St. Thomas*, 323.

See SURVEY—WATER AND WATER-COURSES.

WIFE.

See HUSBAND AND WIFE.

WILL.

Construction of—Restraint on alienation—Devise on condition.—The testator directed that his wife should have the use and control of all his property real and personal until his two sons W. & H. should come of age or until the said property is disposed of as hereinafter mentioned. He devised to each of these sons

one-half of his farm, to be possessed by them when respectively of the full age of twenty-one. He then gave to his five daughters certain pecuniary legacies to be paid by each of his said sons within specified periods after their possessing the property, and directed them to give his wife a comfortable support, or £10 each annually during her life; and the will then proceeded; "I also will and direct that my above named sons W. & H. do not sell or transfer the said property without the written consent of my said wife during her life." The will was registered. After attaining twenty-one, H. mortgaged his share without his mother's consent, to the defendants C. & M., who sold on default in the mortgage to the defendant O., who purchased as trustee for M., with full knowledge of the state of the title. Upon a bill filed by the heirs-at-law,

Held, affirming the decree of BLAKE, V. C., that the restriction upon alienation was valid, and was a condition, the breach of which worked a forfeiture, but that the heirs took the land in question charged with payment of the annuity and the legacies.

The question whether the mortgage was necessarily a breach of the condition was raised in the argument, but not in the answer, and was not decided. *Earls v. McAlpine*, 145.

Construction of—Legacy—Condition.]—A., by the third clause of his will, devised and bequeathed the residue of his estate to his wife, four sons, and two daughters; the devise and bequest being subject to the condition that they should all unite in paying to the executors before the 1st of January, 1877, the sum of \$1,600, and the same sum before the 25th January, 1882, said sums to

pay the shares of two of the sons, Alexander and Duncan. By the 4th clause he gave the sum of \$1,600 without condition, to Alexander and Duncan. By the 5th clause, he devised to his sons Douglas and Oliver two lots; and after giving several legacies to his daughters, he proceeded, "and further, that Alexander and Duncan work on the farm until their legacies become due." Alexander left the farm in 1871, and entered into mercantile pursuits.

Held, affirming the judgment of PROUDFOOT, V. C., PATTERSON, J. A., dissenting, that Alexander was entitled to the legacy absolutely, and that the direction that he should work on the farm, was not a condition precedent to his right thereto. *Davidson v. Oliver et al.*, 595.

Tenancy at will.]—See MORTGAGE.

WORDS, CONSTRUCTION OF.

"*Opposite or interested party to suit.*"]—See COUNTY COURTS.

"*Bonus.*"]—See MUNICIPAL CORPORATIONS.

"*Party interested.*"]—See ADMINISTRATION.

"*Practical Tanner.*"]—See MASTER AND SERVANT, 1.

WORK AND LABOUR.

See LANDLORD AND TENANT, 3.

YEAR.

Limitation of appeal.]—See APPEAL, 4.

Contract not to be performed with in—Statute of Frauds.]—See MASTER AND SERVANT, 2.

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